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Commonwealth of Massachusetts.

REPORT

OF THE

ATTORNEY-GENERAL

FOR THE

YEAR ENDING JANUARY 20, 1897.

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Commonwealth of Massachusetts.

Office of the Attorney-General,
Boston, Jan. 20, 1897.

To the Honorable the President of the Senate.

I have the honor to transmit herewith my report for the year ending this day.

Very respectfully,

HOSEA M. KNOWLTON,
Attorney-General.

Commonwealth of Massachusetts.

Office of the Attorney-General,
Boston, Jan. 20, 1897.

To the General Court of Massachusetts.

In compliance with Public Statutes, chapter 17, section 9, I submit my report for the year ending this day.

Cases requiring the attention of the department during the year to the number of 614 are tabulated below: —

Indictments for murder,	8
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Indictments for Murder.

No indictments for murder were pending in this Commonwealth at the date of the last annual report.

The following indictments for murder, found since the date of the last annual report, have been disposed of as follows: —

John H. Moran of Clinton was indicted in Worcester county January, 1896, for the murder of Bridget Moran at Clinton, Nov. 2, 1895. He was first arraigned Feb. 5, 1896, when he pleaded not guilty. On May 27, 1896, he was again arraigned, and pleaded guilty of manslaughter. The plea was accepted, and on May 27, 1896, he was sentenced by Gaskill, J., to the state prison for not less than twelve nor more than fifteen years. On June 1 he was committed to the state prison. J. W. Corcoran, Esq., and E. A. Evans, Esq., were assigned by the court as counsel for the defence. In charge of District-Attorney Herbert Parker.

Joseph Trescott, *alias* Joseph Prescott, of Boston, was indicted March, 1896, in Suffolk county, for the murder of Margaret Trescott, *alias* Margaret Prescott, at Boston, Feb. 10, 1896. He was arraigned March 11, 1896, and pleaded guilty of murder in the second degree. The plea was accepted, and on the same date he was sentenced and committed to the state prison for life. In charge of District-Attorney Oliver Stevens.

Hiram H. Morrison of Boston was indicted in Suffolk county April, 1896, for the murder of Florence H. Morrison at Boston, on March 23, 1896. He was arraigned May 25, 1896, and pleaded guilty to so much of the indictment as charges manslaughter, which plea was accepted. On May 26, 1896, he was sentenced to the state prison for not more than fourteen nor less than seven years. He was committed May 27, 1896. Owen A. Galvin, Esq., and

James F. Sweeney, Esq., appeared as counsel for the defence. In charge of District-Attorney Oliver Stevens.

Bagdasar Sharvanian, *alias* Bagdasar Shervanian, of Worcester, was indicted in Worcester county May 11, 1896, for the murder of Misak Der Sahagian, *alias* Masek Der Sahagian, at Worcester, Feb. 13, 1896. He was arraigned May 21, 1896, and pleaded not guilty. On Aug. 26, 1896, he was again arraigned, and pleaded guilty of murder in the second degree, which plea was accepted, and on the same day he was sentenced by Lilly, J., to imprisonment for life. Aug. 27, 1896, he was committed to the state prison. William A. Gile, Esq., was assigned by the court as counsel for the defence. In charge of District-Attorney Herbert Parker.

The following indictments for murder are pending: —

Herbert A. Willis of Taunton was indicted in Bristol county Nov. 7, 1896, for the murder of Fred Strange at Taunton, June 22, 1896, and pleaded not guilty. Henry J. Fuller, Esq., and Fred V. Fuller, Esq., of Taunton, were assigned by the court (Braley, J.) as counsel for the defence. The date for trial has not been fixed. In charge of District-Attorney Andrew J. Jennings.

Isaac F. Sawyer of Boston was indicted in Suffolk county December, 1896, for the murder of an unnamed infant child at Boston, Jan. 6, 1896. He was arraigned Dec. 17, 1896, pleaded not guilty, and asked that counsel be assigned for his defence. No counsel has as yet been assigned. In charge of District-Attorney Oliver Stevens.

Henry Stewart, *alias* Harry Stewart, *alias* Henry Sweeney, of Chicopee, was indicted in Hampden county Dec. 21, 1896, for the murder of Patrick J. Murray at Chicopee, Nov. 14, 1896. He has not yet been arraigned.

Sylvester Roundtree of Boston was indicted in Suffolk county January, 1897, for the murder of Anna White, *alias*

Annie White, *alias* Betty White, at Boston, Dec. 12, 1896. He has not yet been arraigned.

The Attorney-General's Office.

The office of attorney-general existed before the adoption of the constitution, and was recognized by that instrument. No complete designation of the duties of the office was made in the early legislation of the Commonwealth. The attorney-general was recognized as the law officer of the Commonwealth, and conducted its business under the direction of the governor or of the general court. He also had certain common law powers, such as the right to institute proceedings to regulate public charities, which he exercised independently of any control of the governor or the legislature. The first act purporting to define in detail the duties of the office was Sts. 1832, c. 130. By that statute the principal duties of the attorney-general were to conduct the trial of capital cases, to appear for the Commonwealth in the trial of all cases, civil and criminal, in the supreme judicial court, and to give his opinion upon questions of law submitted to him by either branch of the legislature or by the governor and council. This assignment of duties was continued without substantial change in the Revised Statutes, in the General Statutes and in the Public Statutes.

So long as the government of the Commonwealth was administered directly by its constitutional officers, the duties devolved upon the attorney-general by these statutes comprised substantially all of the law business of the Commonwealth. But in the later history of the state the policy has grown up of committing much of the administrative work of government to commissions; until, to-day, more than thirty of such delegate bodies have been established, and very many of the duties of administration have been committed to them.

For a time no regular policy prevailed as to the conduct of the law business of these commissions. Special statutes were passed from time to time, giving certain boards the right to consult with the attorney-general; but the greater number of them, at the time of my first accession to the office, were obliged to submit their questions to the governor, to be by him referred to the attorney-general. Suits

by or against the Commonwealth, in matters coming within the jurisdiction of these commissions, were conducted sometimes by the attorney-general, under the direction of the governor, but more usually by attorneys employed by them, under authority of the statutes creating such commissions.

The attention of the general court was called to this anomalous condition of things by the late Governor Greenhalge; and in consequence of his recommendation a statute was enacted (Sts. 1896, c. 490) which provided that all the law business of the Commonwealth (excepting that committed to the district-attorneys) should be conducted by the attorney-general or under his direction. Under this act the department of the attorney-general became, once more, what it was undoubtedly originally intended to be, the law department of the Commonwealth, having charge of its business.

In obedience to the provisions of this act, I have assumed the charge and direction of all the law business of the Commonwealth, including the important work of the metropolitan commissions. The act was passed June 9, and took effect July 1. It was found impossible to arrange for the transaction of all the business, particularly of the more important commissions, in so brief a time. As a consequence the work of the park commission was not assumed until August, and that of the water commission until November, the learned counsel previously employed by those commissions meanwhile continuing to serve until the times stated.

It may not be improper for me to say that, so far as I am able to judge, the wisdom of the act has been fully justified. The law work, being concentrated in one department and under one control, has been systematized and done more economically and to better advantage. The act commits the responsibility of the conduct of the law business of the Commonwealth and of its departments to an officer chosen directly by the people of the Commonwealth, to whom he in turn is responsible; and, to that extent, is in conformity with the spirit of the Declaration of Rights, which asserts as a fundamental principle of government that all power resides originally in the people, and that the officers of government are at all times accountable to them.

It being found necessary to add to the permanent staff of

the office, Mr. Franklin T. Hammond of Cambridge was appointed as an assistant, and entered upon his duties Sept. 1, 1896. His compensation was fixed with the approval of the governor and council at nine hundred dollars per annum. On November 1st I appointed Mr. William D. Turner as a special assistant in charge of the work of the metropolitan water commission, and his compensation was fixed with the approval of the governor and council at three thousand dollars. Messrs. George C. Travis and James Mott Hallowell, respectively first and second assistant attorneys-general before the passage of the statute of 1896, were continued as assistants under the new act. Mr. Travis has had special charge of the work of the park commission, Mr. Hallowell that of the sewer commission and of the constantly increasing number of grade-crossing cases. In view of the large increase in the amount and responsibility of the duties of these gentlemen, I recommended to the governor and council that their compensation be fixed respectively at thirty-five hundred dollars and twenty-five hundred dollars per annum. These are the only additions to the staff which so far have been found necessary.

It is but simply justice to say that the fidelity, industry and ability of these assistants have contributed materially to the success of the work of the department under the act enlarging its duties.

The Supreme Judicial Court.

It is interesting to note the progress of legislation by which the *nisi prius* jurisdiction of the Supreme Judicial Court has been from time to time taken away. Originally it was the principal trial court of the Commonwealth; and as late as the time of the Revised Statutes, in 1835, it had original jurisdiction of nearly all causes, civil and criminal. The Court of Common Pleas, which preceded the present Superior Court, was established to share the jurisdiction of the Supreme Judicial Court rather than to relieve it. Since the creation of the Superior Court, however, very much of the *nisi prius* jurisdiction of the Supreme Judicial Court has been taken away and conferred upon the Superior Court; so that, to-day, the Superior Court is the great trial court

of the Commonwealth; while the Supreme Judicial Court is gradually assuming its proper place as an appellate tribunal only. Among other matters from which the higher court has thus been relieved are actions of tort (Sts. 1880, c. 28), causes of divorce and annulling of marriages (Sts. 1887, c. 332), capital cases (Sts. 1891, c. 379), petitions for partition and writs of entry (Sts. 1892, c. 169). On the other hand, the Superior Court has been given jurisdiction in equity (Sts. 1883, c. 223) and of certain appeals from Probate Courts (Sts. 1887, c. 332); and by Sts. 1895, c. 116, issues for a jury in equity causes and probate appeals pending in the Supreme Judicial Court may now be tried in the Superior Court.

The evident tendency of legislation is to confine the jurisdiction of the Supreme Judicial Court to appeals upon questions of law; and it may be worth while to consider how far it is necessary to retain such *nisi prius* matters as the court still has jurisdiction of. Actions of contract involving in the county of Suffolk more than four thousand dollars and in other counties more than one thousand dollars may still be brought in the Supreme Judicial Court. There is no longer any occasion for retaining this provision. Nor do I see any good reason why all matters in equity, excepting perhaps prerogative writs (so far as such writs are to be classed as equitable proceedings) should not be heard exclusively in the first instance in the Superior Court. The same may be said of probate appeals. Much apprehension was at one time felt by the bar lest by taking away the *nisi prius* jurisdiction of the court, especially in jury cases, the judges would lose the benefit of practical experience in such matters. There was probably never any ground for this apprehension. I believe the time is drawing near when all *nisi prius* jurisdiction, excepting in special matters like prerogative writs, should be taken from the Supreme Judicial Court and conferred upon the Superior Court, thus establishing the latter as the principal trial court; and the former as a court of appeals, only.

Under existing statutes the judges of the Supreme Judicial Court are called upon to hold fifteen *nisi prius* terms in the various counties, besides those provided to be held in Boston.

Very little is done at these courts that could not be done by the Superior Court. The only matters heretofore occupying any substantial time have been jury issues upon equity and probate appeals; but these may now be sent to the Superior Court; and, if the changes I have suggested are made, these *nisi prius* terms may well be abolished, making provision of course that for matters within its jurisdiction the court should always be open at Boston.

In my report made to the general court in January, 1895, I called the attention of the legislature to the existing laws, which I believe are to be found in very few states excepting Massachusetts, by which terms of the full court are provided to be held in the several counties of the Commonwealth. I had the honor to suggest in that report that there would be less delay in the hearing of law questions, and that, on the whole, the convenience of parties would be subserved, by abolishing the terms of the full court now provided to be held in the various counties, and by providing further that more frequent sessions of the term for the Commonwealth in Boston should be held, so that exceptions and appeals arising in the different counties might be entered and speedily heard therein.

I submitted in that report the reasons which led me to the recommendations therein made. The changes proposed were not at that time favored by the legislature. But I have seen no reason to change or modify the recommendations then expressed, and I beg leave to bring the matter again to the attention of the legislature. Tables were submitted in that report, showing the amount of business in the various terms of the full court for the three years ending Jan. 1, 1895. That all the statistics may be before the legislature, I submit herewith tables showing the number of cases, civil and criminal, for the two years ending Jan. 1, 1897, as follows: —

Criminal Appeals in the Supreme Judicial Court from Jan. 1, 1895, to Jan. 1, 1897.

Where Heard.	Number of Cases.	Waived or Defaulted.	Submitted on Briefs.	Argued.
Berkshire,	4	–	–	4
Hampshire and Franklin,	1	–	–	1
Hampden,	3	–	2	1
Worcester,	4	1	1	2
Plymouth,	3	–	3	–
Bristol, Nantucket and Dukes County,	8	–	–	8
Essex,	10	4	5	1
Total,	33	5	11	17
Add to the above the cases heard in Boston in the same time in the term for the Commonwealth,	67	13	40	14
	100	18	51	31

Civil Appeals in the Supreme Judicial Court from Jan. 1, 1895, to Jan. 1, 1897.

Where Heard.	Number of Cases.	Waived or Defaulted.	Submitted on Briefs.	Argued.
Berkshire,	10	1	2	7
Hampshire and Franklin,	14	–	2	12
Hampden,	55	4	13	38
Worcester,	54	3	4	47
Plymouth,	8	1	6	1
Bristol, Nantucket and Dukes County,	37	5	–	32
Essex,	29	3	11	15
Total,	207	17	38	152
Add to the above the cases heard in Boston in the same time in the term for the Commonwealth,	498	36	71	391
	705	53	109	543

It cannot be necessary for five judges of the Supreme Judicial Court to go, for example, to Pittsfield to hear six cases; nor to Hampshire and Franklin to hear seven cases;

nor to Plymouth to hear one case,— these being respectively the average number of cases heard in those counties in each of the two years ending Jan. 1, 1897. More cases are heard at Taunton and at Salem, but, as these terms are held but once a year, and as, with the modern facilities for travel, it is scarcely more onerous for counsel and parties to go to Boston than to these shires, the interests of justice will be subserved if the cases in those counties are put upon the Commonwealth list in Boston.

The practice of having the full bench of the Supreme Judicial Court go from county to county is almost unique in Massachusetts. In many states, most of them many times larger than Massachusetts, the court sits only at one place. In Pennsylvania it sits alternately on the eastern and western side of the Alleghanies. In other states, where more than one session is held, the different sessions are arranged so as to accommodate two or three different portions of the state. In scarcely any of them is there any pretence of holding such terms in the various shires. The existing custom was established in Massachusetts when Maine was a part of the state and when communication was difficult and expensive, and when the full bench consisted of three or four judges. It is now less expensive and takes less time to reach Boston from all parts of the Commonwealth, than it did when these terms were established to go from the smaller towns of the county to the shire town.

At the suggestion of many members of the bar, I beg to renew the recommendations upon this subject contained in my report submitted in January, 1895.

Pleadings in Criminal Cases.

Following the suggestions contained in my report of last year, the legislature enacted a resolve (Res. 1896, c. 113) providing for the appointment of a commission "to investigate and report upon a plan for the simplification of criminal pleadings, and to prepare a schedule of forms of pleadings to be used in criminal cases." This resolve took effect June 4. It provided that the commission so appointed should report in print to the next general court. It was found impracticable to select a commission which would

undertake the responsibility of considering properly so important a subject in the short time given to the commission by the resolve. It is a work which will require much laborious investigation, and one which cannot be properly done within the time which was practically limited by the terms of the resolve. I ventured, therefore, to advise the acting governor to defer the appointment of the commission provided for in the resolve, and to ask the legislature of this year to re-enact the resolve in such form as to give the commission sufficient time to do the important work devolved upon it. I recommend that such legislation be enacted.

Corrupt Practices in Elections.

Sts. 1892, c. 416, was an act to prevent corrupt practices in elections and to provide for publicity of election expenses. It was but a cautious step in the direction of preventing bribery and corruption. It did not limit the amount which a candidate might contribute to a political committee, or restrict the expenditures which might be made by such committee. The evident intent of the act was to require simply that all campaign expenses should be paid by a committee, and that the items of expense should be made public, trusting to the influence of such publicity to restrain undue and improper expenses. Under this act due returns have in most cases been made by the parties charged with such duty. But it has been found to be ineffectual to prevent, in many cases, large, inordinate and in some cases corrupt expenditures. Numerous instances have occurred where the returns showed a larger amount spent by or in behalf of a candidate than the whole emoluments of the office sought for. Although the purchasing of votes is an indictable offence, instances have occurred where large numbers of persons, in some instances more than the majority which the candidate received, were returned as hired to serve as "canvassers" or "for services upon election day," and paid therefor sums ranging from two dollars to five dollars each. The difference between such expenditures and a direct purchase of votes is merely in matter of form.

I think the time has come when the Commonwealth may well adopt more stringent provisions against corrupt prac-

tices. The law now upon the statute books was based upon the provisions of the English statute, which, however, went much farther. It provided that no person, whether a candidate or not, should spend any money in providing meat or drink entertainment for the purpose of influencing voters, or for the conveyance of voters to and from the polls; and that no person should be legally employed for hire for any service whatever, excepting a limited number of agents, clerks and canvassers, the number depending upon the size of the voting district. I recommend that provisions like these be enacted in this Commonwealth.

The District Police.

As stated in detail in other parts of the report, this department during the past year has assumed the management of a large number of cases of great variety both in character and importance. It frequently happens in the preparation of these cases that investigations must be made of extraneous facts and circumstances. There is at present no one connected with the department who can do this work, and its demands are too uncertain to warrant me in engaging a suitable person to take charge of it; as at times no such services are required, while again I may need at one moment the services of not one person but of several. I therefore suggest that a statute be passed to the effect that upon the request of the attorney-general the chief of the district police shall detail for the assistance of the attorney-general such members of the detective department of the district police as the attorney-general may require for the effective discharge of his official duties.

Official Stenographers.

In 1870 a law was enacted providing for the appointment of stenographers in Suffolk county to report trials of civil cases in the Superior Court. Sts. 1885, c. 291, made similar provisions for the other counties of the Commonwealth; and since the latter statute went into effect, although the law provided for stenographic reports only when agreed to by the parties or ordered by the court, the practice of having civil cases in the superior court, with or without a jury, re-

ported stenographically, has become universal throughout the Commonwealth, to the great convenience of the court, of counsel and of suitors. The testimony and rulings are preserved more accurately, and cases are tried much more speedily and better than under the old system, when the judge and a lawyer on each side pretended to write out the proceedings in long hand.

There is no good reason why the same practice should not be extended to trials in the Supreme Judicial Court, and to criminal trials as well, when in the opinion of the presiding justice the importance of the case makes it expedient. It sometimes happens, too, that the interests of justice would be promoted if, under special authority of the court, testimony given before a grand jury could be taken by a stenographer. I see no constitutional objections against such a course, for testimony before the grand jury, though given in secret, is not required to be kept secret, and may be inquired of afterwards in open court.

I recommend that the statutes relating to official stenographers be so extended.

Criminal Terms.

One of the most important acts of recent years relating to the courts of the Commonwealth is Sts. 1885, c. 384, which abolished terms, substituting sessions, and provided that the courts should always be open in every county for the transaction of business. The act, however, did not apply to criminal business; and the jurisdiction of the Superior Court in criminal matters can only be exercised during the terms provided by statute. I am not advised why this distinction between civil and criminal business was made. But the law is a salutary one and should be extended to criminal business. By other statutes proceedings may be had in capital cases at all times, and the court is practically always open for such cases. As an absurd consequence of this state of the law it has happened that a justice of the court, sitting in vacation for the purpose of transacting some business relating to a capital case, found himself unable to impose sentence in a case upon a complaint for assault and battery, where the defendant was in jail and desired to withdraw his plea. I

recommend that the distinction I have alluded to be abolished; and I am authorized to say that such of the district attorneys as I have been able to confer with concur in this recommendation.

Opinions.

Following the custom of recent years, I append to this report copies of such opinions given during the year as may properly be published, and which may be useful for future reference. If the opinions of the attorney-general are of value, they should be collected and digested. At present they are scattered through the volumes of the annual reports, and are of little practical use for reference. I recommend that the attorney-general be given authority, when in his opinion it may be deemed advisable, to collect, digest and publish the opinions given by the office in book form, and that an appropriation be made for that purpose.

HOSEA M. KNOWLTON,
Attorney-General.

OPINIONS.

A room originally designed as a shop is altered into a hall containing seats for spectators and a stage with a drop curtain. The stage contains a table, mirror and other apparatus, designed for the purpose of producing illusions by means of reflection in the mirror, but is not to be used for plays or other like representations.

Such a hall is not a theatre within the meaning of St. 1894, c. 382.

FEB. 4, 1896.

RUFUS R. WADE, Esq., *Chief Massachusetts District Police.*

DEAR SIR: — St. 1894, c. 382, provides that in every building hereafter to be erected and "designed to be used in whole or in part as a theatre," and in every building to be altered "for the purpose of using the same as a theatre," there shall be exits of a specific width, with stairways from the second floor enclosed with fire-proof walls, and not connected with the basement or first floor of the building. It is further provided that your department shall enforce the provisions of the said law.

Persons in Lynn are proposing to alter a room, originally designed for a shop, into a hall, which, when completed, shall contain seats for spectators, a stage with a drop curtain, and other appurtenances. The stage contains a table, a mirror, and other apparatus designed for the purpose of producing illusions by means of reflections in the mirror. There is said to be no purpose of using the stage for plays or other like representations.

The question on which you desire my opinion is, whether this hall when the alterations are completed will be a theatre, within the meaning of the statutes above referred to, and subject to the provisions thereof.

The word "theatre" is defined, according to the dictionaries, first, as a building appropriated to the representation of dramatic spectacles, and secondly, as a room or hall, with a platform at one end, and ranks of seats rising as they recede from the platform, adapted to lectures, academic exercises, anatomical demonstrations, etc.

Undoubtedly the definition last given is more in accordance with the etymological meaning of the word. Its root is a Greek word, signifying a "view" or "sight;" and it is properly used to designate a place designed for exhibitions of whatever character, provided with seats for spectators.

But in construing statutes it is a safe rule to regard words in common use, which are used in statutes, as having their common and ordinary significations. It cannot be questioned that as the word "theatre" is usually employed it means a play-house, that is to say, a building with seats for spectators, containing a stage provided with curtains, scenery and other furniture, and adapted to the giving of dramatic entertainments. It is not usually employed to designate buildings of any kind in which mere exhibitions are given. In the larger sense of the word many buildings used for educational, literary, and even religious purposes, might properly be called theatres; but as the word is used in common speech it means a play-house. I think it must be taken to have been used in that sense in the statute under consideration.

This view is supported somewhat by the use of the word, and of the adjective "theatrical," in other statutes. Pub. Sts., c. 48, § 8, prohibits the employment of children under fifteen years of age "in any circus or theatrical exhibition, or in any public place whatsoever." Section 9 prohibits the granting of a license "for a theatrical exhibition or public show" in which children under fifteen years of age are employed. Pub. Sts., c. 102, § 115, provides that the mayor and aldermen, etc., may license "theatrical exhibitions, public shows, public amusements, and exhibitions of every description to which admission is obtained on payment of money." . . . "Pub. Sts., c. 104, § 20, provides that "all churches, school-rooms, hotels, halls, theatres and other buildings used for public assemblies shall have means of egress," etc.

The foregoing statutes clearly recognize the distinction between circuses, exhibitions, concerts, public shows," etc., on the one hand, and theatrical exhibitions on the other. The essence of a theatre, not only as the word is used in common speech, but in the statutes as well, lies in the fact that it is used for dramatic purposes.

It may be said that St. 1894, c. 382, was enacted for the protection of spectators from the dangers of fire, and that the provisions of the statute in question would apply with great propriety to all sorts of public exhibitions. But the provisions of escape in case of fire prescribed by the statute require special methods of construction, which are expensive and not easily adapted to ordinary public halls. It is to be presumed that the Legislature, in

view of the large expense which would be required to make buildings conform to the stringent requirements of the statute, considered that it would be inexpedient to make its provisions obligatory except upon public play-houses.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

County commissioners have authority to employ registers of deeds to make the classified indexes required by Pub. Sts., c. 24, § 25, and to pay them for such services in addition to their fixed salaries.

FEB. 5, 1896.

CHARLES R. PRESCOTT, Esq., *Controller of County Accounts.*

DEAR SIR: — Under Pub. Sts., c. 24, registers of deeds were paid by fees, and employed their own assistants and clerks.

Following the tendency of legislation in this Commonwealth, the fee system established by the Public Statutes was abolished by St. 1895, c. 493. Under the provisions of that statute, registers are now paid by fixed salaries. They are authorized to employ clerical assistance, with the approval of the county treasurer, and are required to account to the county for all fees received by them.

Pub. Sts., c. 24, § 25, further provides for the making of classified indexes to the records. The county commissioners from time to time may "cause to be made at the expense of their several counties, by competent persons employed by them, copies of indexes to the instruments recorded in the registries of deeds during the preceding year, in which copies the grantors and grantees shall respectively be assorted," etc. These classified indexes are in addition to the indexes required to be kept by registers of deeds as a part of their regular duties.

Under section 25 the county commissioners have frequently, and, perhaps, usually, employed registers of deeds and paid them therefor. This employment had no relation to the regular duties of registers, and the compensation was not paid out of the fees received by them.

The question contained in your letter of the 29th ultimo is, whether county commissioners may still continue to employ registers to make such classified indexes, and to pay them therefor in addition to the salaries fixed by St. 1895, c. 493. I see no reason why registers may not be so employed, and be paid therefor in addition to the salaries established for their regular duties. Sts. 1895, c. 493, did not enlarge the duties of registers. It merely provided that they should be paid by fixed salaries, instead of by

fees. It did not include the making of classified indexes as a part of their regular work, and, if the county commissioners see fit to employ them in such work, they have the same right as before to pay them therefor. There is no provision in St. 1895, c. 493, that their duties as registers shall be exclusive.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A trial justice may sentence to a jail or house of correction in any county.

FEB. 13, 1896.

T. J. COBB, Esq., *Clerk Third District Court of Bristol, New Bedford, Mass.*

DEAR SIR: — I have your letter of the 4th, asking my opinion as to whether trial justices may sentence to a jail or house of correction in any county. You have no right to the opinion of this office, but in view of the fact that the question is of importance throughout the Commonwealth, I have examined the matter, and beg to reply as follows: —

The first statute authorizing sentence out of the county was St. 1866, c. 280; which in section 2 provided that "the supreme judicial court or superior court, holden in any county," etc., might commit a person to a house of correction in any county in the Commonwealth. This was superseded by St. 1870, c. 370; which in section 4 provided that "the supreme judicial court, the superior court or any municipal or police court" might sentence "to any jail or house of correction of any county in the Commonwealth." This statute was re-enacted by Pub. Sts., c. 215, § 13, the language of which is "a court may sentence any person convicted before it of an offence punishable by imprisonment in a jail or house of correction to a jail or house of correction of any county." This statute is still in force.

I am of the opinion that the word "court" in the section last quoted must be taken to be any tribunal having authority to impose a sentence under the laws of Massachusetts. It is true that the section in St. 1870, c. 370, of which this was a revision, limited the power of sentence out of the local county to the higher courts and to municipal and police courts. That itself, however, was an enlargement of the jurisdiction given by the prior statute to sentence out of the county, and I see no difficulty in holding that the legislature intended by the Public Statutes still further to enlarge such jurisdiction. In many places in Pub. Sts., c. 215, the

word "court" is used in such a way as to include by necessary implication trial justices. For example, in section 8 it provides that "when an offence is punishable by fine and imprisonment in the jail, or by fine and imprisonment in the house of correction, the offender may at the discretion of the court be sentenced to be punished by such imprisonment without the fine," etc., "in all cases where he shows to the satisfaction of the court that he has not before been convicted," etc. This section clearly applies to trial justices. Other sections might be cited to the same effect.

The proceedings of a trial justice are in the Public Statutes designated as a court. Pub. Sts., c. 155, § 12, provides that "trial justices may severally hold courts," etc. Section 71 provides that "they may adjourn their courts in all cases, civil or criminal."

It is held in Carter *v.* Burt, 12 Allen, 424, that the statute authorizing sentence to be imposed in any house of correction, instead of in the house of correction in the county in which the offence is committed, does not work an increase or aggravation of sentence. "In legal contemplation a commitment to a house of correction in one county for a specific term cannot be regarded as a higher or lesser punishment than a commitment to a house of correction in another county for the same period of time." It follows, therefore, that there is no objection in principle to giving trial justices the same discretion as to the house of correction in which sentence is imposed as police and municipal courts. I think it must be held that the legislature so intended.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A person other than a lawyer may register as legislative counsel under St. 1890, c. 456.

FEB. 15, 1896.

Capt. JOHN G. B. ADAMS, *Sergeant-at-Arms.*

DEAR SIR: — Your letter of January 28th asks my opinion upon the question whether any person not a lawyer may legally register as legislative counsel.

St. 1890, c. 456, entitled "An Act to regulate the employment of legislative counsel and agents," etc., provides in section 1 for two classifications of employment, the one of legislative counsel, the other of legislative agents. The functions of legislative counsel are clearly defined by the act. Section 2 provides that "in the docket of legislative counsel shall be entered the names of counsel employed to appear at a public hearing before a committee of the general court for the purpose of making an argument or examining

witnesses. . . ." Section 3 further provides that "no person whose name is entered on the docket of legislative counsel shall render any service as legislative counsel or agent otherwise than by appearing before a committee as aforesaid, and by doing work properly incident thereto. . . ."

The functions of legislative agents are not defined, excepting so far as they may be inferred from the language of section 2, as amended by St. 1891, c. 223, § 2, providing that "in the docket of legislative agents shall be entered the names of all agents employed in connection with any legislation, and of all persons employed for other purposes who render any services as such agents." The history of the act, however, leaves no room for doubt that by the term "legislative agents" the legislature intended to designate persons commonly called lobbyists.

These two functions are entirely distinct. The counsel appears before the committee, conducts the hearing and presents the cause of his employers. The agent, by other methods, aids in the passage, or in preventing the passage, of legislation that may affect the interests of those whom he serves.

The purpose of the act was to designate and identify those who are employed respectively as counsel and as lobbyists. A lobbyist may not act as counsel without entering his name in the docket of legislative counsel. Counsel, on the other hand, are expressly forbidden from acting as lobbyists, except upon proper registration as such.

There is nothing in the act which prevents a person not an attorney-at-law from being employed as counsel. By the entry of his name in the docket of legislative counsel a layman is entitled to appear for his employers before committees of the general court, to examine witnesses and to argue the cause; but under the provisions of the statute in question he must first register as such counsel. If the legislature had intended to prohibit the employment of persons other than attorneys-at-law, it would undoubtedly have been so expressed in the act.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

Assessment insurance companies organized under St. 1890, c. 421, have legal authority to issue policies of insurance to minors.

FEB. 15, 1896.

Hon. GEORGE S. MERRILL, *Insurance Commissioner.*

DEAR SIR: — I have your letter of the 29th ultimo requesting my opinion upon the question whether, under the provisions of St.

1890, c. 421, assessment insurance corporations organized under that statute may issue policies of insurance to minors.

There is no prohibition at common law against the making of contracts by or with minors. Such contracts are lawful, and are voidable only by the act of the minor himself, or his duly constituted guardian. If the contract is for necessaries, or is manifestly for the advantage and benefit of the minor, and has been performed by the other party, it is usually not even voidable by the minor himself.

Unless, therefore, there is something in the statutes prohibiting the making of a contract of insurance with a minor, it is a lawful contract, and one which may be enforced against the company. Whether it may be enforced against him depends upon the question as to whether it is for his advantage. This, however, is not a question which affects the validity of the contract, so far as the corporation is concerned; and if an insurance company sees fit to assume the risk of having the contract avoided by the minor, it may do so.

There is nothing in the statute in relation to assessment insurance which in terms forbids the making of contracts of insurance with minors. There is a prohibition against issuing a policy to a person more than sixty years of age, but no limit in the other direction. I am of the opinion, therefore, that a contract of insurance made by an assessment insurance company with a minor is not unlawful.

My attention has been called to the opinion of the court of appeals of the State of New York, in the case of the Globe Mutual Benefit Assn., 135 N. Y. 280, in which it was held that co-operative or assessment life insurance companies, organized under the provisions of the statutes of New York, may not receive minors as members. That case turns upon the construction given to the New York statutes, which in many respects differ from those of Massachusetts. I infer from reading the opinion that under the laws of New York whoever is insured in a co-operative or assessment company becomes a member of the association, and as such a member is entitled to all the rights and privileges of a member of the association. The court also refer to other provisions of the statutes as showing the impracticability of permitting minors to become members of such associations, and conclude with these words: "We place our assent to the judgment below on the ground that it appears from a consideration of the statute of 1883, and the nature and object of co-operative insurance companies, and the relation which members hold to the corporation, that adult persons only were contemplated as entitled to membership.

The law fixes an arbitrary period when persons become clothed with general legal capacity, and while in many cases youths under twenty-one are capable of exercising an intelligent judgment and might properly be admitted to the advantage of membership in a company like that of the defendant, in many others they would be wholly unfitted to act as members of such an organization."

Without questioning the soundness of this opinion, it is yet obvious that the grounds upon which it is put do not apply to assessment companies organized under the laws of Massachusetts. These companies are not mutual in the sense in which that word is usually employed. St. 1890, c. 421, §§ 2–8, provide for the forming of corporations of this class. Seven or more persons may form such a corporation, and these persons may or may not be insurers; and there is no provision that persons with whom contracts of insurance are made thereby necessarily become members. It is true the word "membership" is used in section 10 as relating to policy holders. It provides that a policy shall specify the sum of money which it promises to pay upon the contingency insured against, "which shall not be larger than the amount of one assessment upon the entire membership." Taking the whole statute together, however, it is obvious that this word is used to designate the whole number of persons holding contracts, and not as indicating their relation to the corporation.

There is also a provision in section 12 that a corporation shall not transfer its risks unless the contract of transfer is first submitted to and approved by a two-thirds vote of a meeting of the insured called to consider the same. Although, if contracts with minors are permitted, this section may contemplate the exercise of the right of voting by minors, I do not think it is sufficient of itself to render the making of contracts with minors unlawful. There is no necessary difficulty in minors exercising the rights given them under section 12.

I can discover no reason which would prohibit the issuing of contracts of insurance by these companies to minors which would not apply equally well to mutual life insurance companies, the making of contracts by which with minors has universally been recognized as lawful.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

St. 1894, c. 522, § 20, provides that no insurance company shall insure in a single hazard a larger sum than one-tenth of its assets. The word "hazard" as here used signifies the chance of loss to which the insurance company subjects itself; and a single hazard means a single chance of loss, whether the company be called upon to pay upon one policy or upon more than one.

FEB. 19, 1896.

Hon. GEORGE S. MERRILL, *Insurance Commissioner.*

DEAR SIR: — St. 1894, c. 522, § 20, provides "that no fire insurance company shall insure in a single hazard a larger sum than one-tenth of its assets. The question stated in your letter of January 17th is as to the meaning of the word "hazard" in that section. Is the expression "single hazard" to be taken to signify a single chance of loss, whether on one policy or more than one, upon the occurrence of which the insurance company may be called upon to indemnify the parties insured; or does it merely mean a single contract of insurance?

A hazard is a chance. Applied to insurance, it is a chance of loss, the incurring of the possibilty of loss for the possibility of gain. It is not the contract under which the liability is incurred, but the liability itself. This is the usual meaning of the word, and I see no reason to doubt that this is its meaning in the section above quoted.

The plain purpose of the statute was to prevent insurance companies from staking an undue amount upon a single liability. This purpose would be defeated if it were intended to permit the issuing of separate policies, together aggregating a larger amount than the limit fixed by the statute, all payable upon the occurrence of the same loss. For example, if ten different part owners of a vessel could each insure in the same company his interest in the vessel to an amount equal to one-tenth of the net assets of the insurance company, the result would be that the entire net assets would be staked upon the loss of the vessel.

If the legislature had intended to limit not the liability to loss but the amount of insurance in any given policy, the words "contract" or "policy" would undoubtedly have been used instead of the word "hazard." Whenever the policy itself is referred to in the insurance statutes those words are employed.

The question has not been discussed in Massachusetts, but in the case of German Am. Ins. Co. *v.* Commercial Fire Ins. Co. (Alabama), 11 Southern Rep. 117, a similar construction was given to a contract which limited the liability of an insurance company to a certain sum "in any one building or risk."

I am of the opinion, therefore, that the word hazard as here

used signifies the chance of loss to which the insurance company subjects itself; and a single hazard means a single chance of loss, whether the company be called upon to pay on one policy or more than one.

The remaining questions in your letter are specific rather than general. I understand, however, that they are put by way of illustration, and not because such cases have arisen. In applying the statute it may be difficult to lay down in advance any definite rule. It is better to deal with each case as it arises. It is not difficult, for example, to hold that all the cargo in one vessel, or all the goods in one warehouse, though held under separate ownerships, constitute, in insurance, one hazard. On the other hand, two buildings, though near each other, — so near, in fact, that the burning of one endangers the other, — are separate hazards. Whether two parts of the same building, separated by fire-proof partitions or otherwise, constitute a single hazard, is a question which may depend upon an examination of the circumstances of the case.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The jurisdiction and authority to grant a franchise or location for a street railway is vested as to towns in the board of selectmen and as to cities in the board of aldermen, and the establishment of state highways has not taken away this authority. The only modification thereof as regards state highways is in St. 1893, c. 476, § 14, which provides that a state highway shall not be dug up for laying railways except by written consent of the superintendent of streets or road commissioners, approved by the highway commission, and then only in accordance with the rules and regulations of said commission.

FEB. 28, 1896.

Massachusetts Highway Commission.

GENTLEMEN: — The question submitted by Mr. Perkins of your board for my consideration is as follows: "When a road is laid out as a state road, who has the granting of franchises for street railways, the commission or the town?

The question suggests that towns have the right of granting franchises or locations for street railways in other than state highways. This is a misapprehension. Neither towns nor cities have any voice in reference to the location of street railways upon the ways within their limits. That jurisdiction is vested as to towns in the board of selectmen, and as to cities in the board of aldermen. (See Pub. Sts., c. 113, §§ 7, 21–26 inclusive.) These boards act not as agents of the town, but as public officers.

Their duties are to determine what public convenience and necessity require with reference to the use of ways by street railway companies where such ways are laid out by towns or by counties. The municipality in which this way is situated has no authority in the matter. The selectmen cannot be compelled to grant a location, even if the town so votes; and a vote of the town instructing the selectmen to refuse the location is not binding upon that body.

The establishment of state highways has not taken away this jurisdiction of the selectmen. The only modification is in St. 1893, c. 476, § 14, which provides that a state highway shall not be dug up for laying railways, etc., "except by the written consent of the superintendent of streets or road commissioners of a city or town, approved by the highway commission, and then only in accordance with the rules and regulations of said commission." The jurisdiction as to the question whether public convenience and necessity require the use of the streets for street railway purposes is still vested in the selectmen of towns and the board of aldermen of cities, whether such ways are laid out and maintained by towns, by counties or by the Commonwealth.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A justice of the peace authorized to exercise special powers under St. 1884, c. 286, is still within the exception of Chapter VI., Article II. of the Constitution, which declares that the office of justice of the peace shall not be reckoned as one of the two offices more than which one person may not hold.

FEB. 29, 1896.

Hon. WILLIAM M. OLIN, *Secretary of State.*

DEAR SIR: — I have your letter of the 25th inst., asking my opinion as to whether St. 1884, c. 286, creates an office within the meaning of Chapter VI., Article II. of the Constitution.

St. 1884, c. 286, provides that "the governor, with the advice and consent of the council, may from time to time upon the petition of, etc., designate and commission some justice of the peace residing, etc., who may issue warrants . . . in criminal cases . . . and take bail thereon."

Chapter VI., Article II. of the Constitution, provides that "never more than any two offices which are to be held by appointment of the governor, or the governor and council . . . military offices and the offices of justices of the peace excepted, shall be held by one person."

I understand your question to be whether a person commissioned to receive complaints, issue warrants and take bail, under St. 1884, c. 286, holds another office than that of justice of the peace so as to debar him from holding more than one other office in addition thereto; or whether he is to be regarded as still within the exception of the Constitution, which declares that the office of justice of the peace shall not be reckoned as one of the two offices more than which the same person may not hold.

The office of justice of the peace is of ancient origin. From the earliest times, until changed by recent legislation, it was one of the functions of justices of the peace to receive complaints and issue warrants for the apprehension of persons charged with crime. That power was taken away by St. 1877, c. 211, and conferred upon certain other officers, to wit, trial justices and clerks of courts. It was found, however, to be inconvenient to require the inhabitants of a town in which neither a trial justice nor a clerk resided to go in search of such an officer in order to make complaint. To remedy this difficulty St. 1879, c. 254, of which St. 1884, c. 286, is an amendment, was enacted, and the right to receive complaints and issue warrants was restored to such justices of the peace as might be designated and appointed therefor by the governor.

Such being the history of this legislation, I do not think that St. 1884, c. 286, or the acts of which this is an amendment, are to be regarded as creating a new office within the meaning of the Constitution. Persons holding commissions under this statute are still justices of the peace, but with more ample powers than those not so commissioned. It is true the incumbent is in receipt of two commissions from the governor, but those commissions cannot be regarded, in my judgment, as investing him with two offices. It is more reasonable to hold that he is, notwithstanding his two commissions, still a justice of the peace, only with special powers.

Very respectfully yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A convict was committed to the State Prison upon a sentence of ten years. Later in the same year he was sentenced for another offence to a term of five years, to take effect from and after the expiration of the sentence he was then serving. The two sentences cannot be added together and construed as one sentence, for the purpose of bringing the case within the terms of St. 1895, c. 252.

APRIL 4, 1896.

FRED. G. PETTIGROVE, Esq., *Secretary.*

DEAR SIR: — I have your letter of March 6th, asking my opinion upon the facts therein stated, as follows, to wit: — a

convict was committed to state prison Feb. 10, 1890, upon a sentence of ten years; June 30, 1890, he was sentenced for another offence to a term of five years in the state prison, "to take effect from and after the expiration of the sentence he was then serving."

The question stated in your letter is, whether the two sentences may be added together and construed as one sentence, for the purpose of bringing the case within the terms of St. 1895, c. 252.

The statute referred to provides that when it appears to the commissioners that a person "held in the state prison upon his first sentence thereto has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence upon such terms and conditions as they deem best."

It is obvious that the statute is inapplicable to the first sentence, taken by itself. It cannot be presumed that the legislature intended that a prisoner should be at large, engaged in the business of reformation, for a period of years, at the expiration of which he should return to enter upon a second sentence.

The only possible way, therefore, in which the statute can be made to apply, is in the manner suggested in your question, to wit, by regarding the two sentences as one sentence of fifteen years. I do not think that such a consolidation of sentences can be inferred. Such a thing could only be done by direct legislation, and the omission of any provision looking to any such consolidation is to my mind conclusive against such an assumption. I am, therefore, of opinion that the two sentences cannot be regarded as one.

The matter of successive sentences seems not to have been considered in this law, nor in another statute of the same year (St. 1895, c. 504), relating to indeterminate sentences. There seems to be need of further legislation upon the subject.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A single certificate signed by two physicians may be issued under the provisions of St. 1895, c. 286, when the facts recited by both physicians are the same; otherwise, when such facts are not the same.

It is within the discretionary power of the State Board of Lunacy and Charity to transfer from the lunatic hospitals to the asylum for insane criminals persons committed under the provisions of Pub. Sts., c. 214, §§ 16 and 19.

MARCH 28, 1896.

CHARLES E. WOODBURY, M.D.

DEAR SIR: — I have your letter of the 16th, asking my opinion upon two questions.

First. — Under St. 1895, c. 286, is it lawful to issue one certificate signed by two physicians in the commitment of an insane person; or does the law require a separate certificate to be signed by each physician?

Pub. Sts., c. 87, § 13, of which St. 1895, c. 286, is an amendment, clearly provides for a single certificate to be signed by two physicians. This chapter was amended by St. 1892, c. 229, so as to require the oath of the subscribing physicians to certain facts of qualification; but the provision as to a single certificate to be signed by both physicians remains unchanged. The purpose of St. 1895, c. 286, is to require the incorporation of certain other statements in the certificate, and to provide for certain additional qualifications on the part of the certifying physician. The form of the certificate recited in the chapter apparently looks to a separate certificate by each of the two physicians; but by c. 429 of the same year (1895), which dealt with the same subject, it is provided that in the commitment of an insane person there must be filed with the judge "the certificate of two physicians certifying to such person's insanity, made in accordance with the provisions of section one of chapter two hundred and eighty-six of the acts of the present year."

Taking this statute in connection with c. 286, it seems to have been the intention of the legislature not to require separate certificates, when the facts upon which the opinion given in the certificate is based are the same as to both physicians. A joint certificate of course cannot be issued where the facts recited by the two physicians are not the same.

Second. — Under St. 1895, c. 390, has the board authority "to transfer from the lunatic hospitals to the asylum for insane criminals criminal insane other than those committed from jails, state prisons, houses of correction, etc."

I assume that your question relates to persons committed under the provisions of Pub. Sts., c. 214, §§ 16 and 19. Section 16 provides that a person under indictment, who is found by the court to be insane, may by order of the court be removed to one of the state lunatic hospitals for such a term, and under such limitations, as it may direct. Section 19 provides that when a person is acquitted by the jury by reason of insanity, the jury shall state that fact to the court, and thereupon the court, if satisfied that he is insane, may order him to be committed to a state lunatic hospital, etc. St. 1895, c. 390, establishing an asylum for insane criminals at Bridgewater, provides in section 5 that the state board may transfer to and from the state lunatic hospital, and the asylum for insane criminals, "any of the description of persons mentioned in

this act." Section 4 of the same act provides expressly that insane male persons mentioned in Pub. Sts., c. 214, §§ 16 and 19, may be committed to the asylum for insane criminals.

I am of opinion, therefore, that the intention of chapter 390 is to confer upon your board authority to transfer persons committed under the provisions of Pub. Sts., c. 214, §§ 16 and 19, to and from the Bridgewater asylum, whenever, in its judgment, it shall be deemed proper to do so.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

St. 1894, c. 356, requiring the preservation of certain town documents for several years only, does not apply to warrants for the holding of town meetings. Such warrants should be permanently preserved.

APRIL 15, 1896.

ROBERT T. SWAN, Esq., *Commissioner of Public Records.*

DEAR SIR: — Your letter of April 5th requests my opinion upon the question whether, under St. 1894, c. 356, town clerks are required to preserve warrants for town meetings longer than seven years.

Section 1 provides that certain documents shall not be destroyed; to wit, (1) books of record or registry; (2) original papers dated earlier than the year 1800; (3) deeds; and (4) reports of "any agent, officer or committee of any county, city or town relating to bridges, highways, streets, town ways, sewers or other county or municipal interests or matters." It is obvious that town warrants are not included within the provisions of this section. Section 2 prohibits the destruction of any other paper belonging to the files of the town until after seven years. In answering your question literally, therefore, it is plain that under the provisions of this statute town warrants need not be kept longer than seven years.

But I do not regard this statute as intended to be comprehensive of all the duties of town officers relating to the preservation of documents. It prohibits the destruction of certain documents within seven years, but is not intended to require or permit such destruction, even at the end of seven years, if, for any reason, they should be preserved.

The warrant for the town meeting, and the return of service of it, are essential to give validity to the proceedings of town meetings. If there is no warrant, or it is improperly or insufficiently served, the title of the officers chosen at the meeting may be directly, and, in some cases, perhaps, collaterally, impeached. Most proceedings become of little importance after the expiration

of the year, but some may be questioned even after the expiration of seven years, as, for example, town by-laws, or long-time loans. In such cases, the warrant and its service may at any time become of vital importance. It is evident, therefore, that the statute requiring preservation of town documents for seven years has no application to town meeting warrants, and that they should be permanently preserved.

It may be said that the recording of the warrant, and of the return of service upon it, sufficiently preserves the evidence essential to show the validity of the meeting. There is no statute, however, requiring the clerk to record the warrant; and, although the record when made has been accepted by the courts as evidence of the contents of the warrant and the manner of its service (Com. *v.* Sullivan, et als, 165 Mass. 183), it is not entirely certain that, if the question were directly raised, the record of the clerk would be competent evidence of the contents of the warrant, or of the service of it.

It is undoubtedly the safer course for town clerks to follow the practice of private corporations, in recording the call for the meeting with the proceedings of the meeting itself; but the warrant itself is, nevertheless, the best evidence, and should be preserved.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The sum of $2,000 already paid to the Massachusetts Institute of Technology for the year 1896 under authority of Resolves 1895, c. 70, is not to be considered as part payment of the sum of $4,000 payable for the year 1896 under St. 1896, c. 310.

MAY 1, 1896.

Hon. JOHN W. KIMBALL, *Auditor.*

DEAR SIR: — Res. 1895, c. 70, provides that annually for the term of six years there shall be paid from the treasury of the Commonwealth to the treasurer of the Massachusetts Institute of Technology the sum of $2,000 for scholarships, which sum was made payable from and after the first day of January in the year 1896. I understand from your letter that the sum of $2,000 has already been paid for the year 1896, an appropriation therefor having been made.

St. 1896, c. 310, provides for the payment of the sum of $4,000 annually for scholarships, beginning on the first day of September in the year 1896. By the same act Res. 1895, c. 70, was repealed.

The question stated in your letter is whether the $2,000 already

paid is to be considered as part payment of the $4,000 provided for by St. 1896, c. 310.

I am of opinion that St. 1896, c. 310, was not intended to supersede Res. 1895, c. 70, as to the payment already made. Under the terms of the resolve, the amount appropriated was payable from and after the first day of January in each year. The legislature must have had in view the fact that the payment for the year 1896 had been made. Having made no deduction by reason thereof for the year beginning Sept. 1, 1896, it is inferred that the legislature did not intend any deduction to be made.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The division of the Commonwealth into districts containing as nearly as practicable an equal number of inhabitants in accordance with Revised Statutes of the United States, section 23, should be made with reference to the number of inhabitants as ascertained by the United States census.

MAY 4, 1896.

Hon. I. P. HUTCHINSON, *Chairman.*

DEAR SIR: — The Constitution of the United States, Article I., Section 2, provides that the house of representatives shall be composed of members chosen every second year by the people of the several states. It further provides that representatives "shall be apportioned among the several states which may be included within this Union according to their respective numbers." Article XIV. of the Articles of Amendment does not affect the questions suggested in your letter. It is further provided in said Article I., Section 2, that the "numbers" shall be determined by an enumeration to be made every ten years under the authority of Congress.

The Revised Statutes of the United States, section 23, provides that representatives shall be elected "by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants."

Congress has further provided since the last national census that the number of representatives to which Massachusetts is entitled is thirteen.

I believe the foregoing comprise all the limitations imposed upon the several states as to the election of representatives, to wit, they must be chosen by the people at an election held on the Tuesday after the first Monday of November; there shall be thirteen from Massachusetts; and they shall be elected by districts composed of contiguous territory, and containing, as nearly as practicable, an equal number of inhabitants.

The apportionment of the number of representatives being by the United States census, I am of opinion that the division into districts "containing, as nearly as practicable, an equal number of inhabitants," must refer to the numbers as ascertained by the United States census.

Your question, "how far the joint committee can go in regard to changes, etc., and conform to the order attached," is one of policy rather than of law. If the committee conforms to the provisions of the United States Constitution and statutes above set forth, the whole matter of boundary lines, etc., is in their discretion.

I need not say that the division into districts, although usually made once in ten years, may be made from time to time if the state sees fit.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The bonds of the Boston Terminal Company secured by a mortgage upon its real estate are not taxable under the general law of the Commonwealth.

MAY 13, 1896.

Hon. ARTHUR H. WELLMAN, *Chairman Committee on Railroads.*

DEAR SIR: — I am of the opinion that the bonds of the Boston Terminal Company, provided for in the proposed bill for a southern union station, are not taxable. They are secured by a mortgage of the real estate of the corporation, and are therefore debts secured by mortgage. (Knight *v.* Boston, 159 Mass. 551.) There is no difference in principle, as far as the tax laws are concerned, between the bonds of the Boston Water Power Company, which were in issue in that case, and the proposed bonds of the Boston Terminal Company.

They are not railroad bonds, which are bonds issued by a railroad corporation.

Railroad bonds, whether secured by a mortgage or not, are taxable under the statutes of Massachusetts. Gen. Sts., c. 11, § 4, enumerated the different classes of personal property subject to taxation. Among other things were enumerated "money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for;" also as an additional class "public stocks and securities." In Hall *v.* County Commissioners, 10 Allen, 100, it was held that public stocks and securities were not included in the class of "money at interest and other debts due the person to be taxed." Metcalf, J., in his opinion says: "As the statute enumerates debts due to the tax payer and stocks

and securities, as distinct and separate subjects of taxation, the latter are not to be included in the former."

Some time after this decision the assessors of the town of Northampton assessed a tax payer for certain railroad bonds held by him as a distinct class of property. The taxpayer claimed that he had the right to deduct therefrom, for the purposes of taxation, debts due from him under the provisions of the statute which authorizes the deduction of debts due from a person from the debts due to him. The court, however, held that railroad bonds were not public stocks and securities; and not being enumerated as a separate class of property for the purpose of taxation, they were to be included in the class of "debts due the persons to be taxed;" and therefore only to be taxed for the balance remaining after the deduction of the debts due from the holders thereof. (Hale *v.* County Commissioners, 137 Mass. 111.)

In consequence of this decision, St. 1888, c. 363, was enacted, by which railroad bonds as such were made a separate and distinct class of property, subject to taxation. There can be no question that this was the clear intent of the legislature; and that under this statute railroad bonds were taken out of the class of "debts due the persons to be taxed" and made a class by themselves, in the same way that public stocks and securities had theretofore been.

The provision with relation to the exemption of debts secured by mortgage, as it appears in the Public Statutes, applies solely to the class of taxable property designated by the phrase, "money at interest, and other debts due the persons to be taxed," etc. It has no reference to the other classes of property, such as public stocks and securities, turnpike bonds, railroad bonds, etc. The same considerations which led the court to hold that the provision which authorizes the deduction of debts due from the tax payer from debts due to him did not include bonds separately enumerated as distinct subjects of taxation, apply with equal force to the provision in regard to debts secured by a mortgage.

Whether the tax assessed upon the real estate of the Terminal Company should be deducted from its franchise tax is a question of legislative policy upon which I do not feel competent to advise. I may be permitted to suggest, however, that, if the terminal bonds are made taxable like railroad bonds, then the deduction of the real estate tax from the franchise tax would make the whole bill consistent with existing legislation. Whatever objections might be urged against such a deduction would apply with equal force to the general law upon the subject.

Very truly yours,

Hosea M. Knowlton, *Attorney-General.*

The International Trust Company has no authority to deposit in its banking department any portion of the fund held by it in trust.

MAY 11, 1896.

Hon. STARKES WHITON,
Chairman Board of Savings Banks Commissioners.

DEAR SIR:—Your letter of February 17th, which was duly received, requests my opinion upon the following state of facts.

The International Trust Company was chartered by St. 1879, c. 152. By this charter it is authorized, among other things, to receive deposits of money, and to invest the same in certain specified securities. Acting under this authority, it carries on a business of a bank of deposit, subject only to the limitations imposed by its charter.

By St. 1883, c. 222, it was further authorized to carry on a trust business, and to act as trustee. Acting under this authority, it has established a trust department, the books of which are kept in due form, and separate and distinct from the books relating to its general business. From time to time money has been paid to it in trust under the authority of said statutes. It has been the custom of the company, when any part of the principal of a trust fund is uninvested, to deposit the amount in the banking department of the company, and issue therefor a certificate of deposit to itself as trustee, for the account of the particular trust to which the money belongs. These certificates are filed with the papers relating to the trust, and are treated as an investment thereof. When any portion of the income of any trust remains undistributed, it is likewise deposited in the banking department, itemized and particularized, and entered to the credit of "trust deposits income," on the same ledger and in the same manner as the general deposits of the company. The money so deposited, both the uninvested portion of the trust fund and the uninvested income, is merged with the funds of the general depositors and the capital and surplus of the company.

The question stated in your letter is, whether this method of doing business is authorized by the statutes governing the company.

St. 1883, c. 222, which allows the company to accept trusts, provides in section 2 that a portion of the capital shall be set apart as a trust guarantee fund. This trust guarantee fund, and all moneys or property received in trust, "shall be loaned or invested only in such securities as savings banks chartered in this Commonwealth are now or may hereafter be authorized to invest in." The section further provides that such money held in trust, including the trust guarantee fund, "shall constitute a trust deposit, and

such funds and the investment or loans of them shall be especially appropriated to the security and payment of such deposits, and not be subject to any other liabilities of the corporation." It is also provided in said section that, "for the purpose of securing the observance of this proviso," the corporation shall have a trust department in which "all business pertaining to such trust property shall be kept separate and distinct from its general business."

The plain purpose of these provisions is that the trust business of the company shall be absolutely separate from the banking business of the company. The company claims that by keeping separate books of its trust department, and by identifying deposits of trust funds in its banking department by means of the certificates referred to, it sufficiently complies with the provisions above quoted. But I do not think the purpose of the statute is accomplished merely by keeping separate books. Books of account must obviously be kept, both of the banking business and of the trust business; and the entries pertaining to one department are, of necessity, separate and distinct from those relating to the other department, whether kept in the same or different books. The statute does not look to the comparatively unimportant matter of book-keeping. It was framed to provide for the security of trust funds, by keeping them separate from the hazards of the general banking business in which the company engages. The business of receiving deposits subject to check, while not, necessarily, a hazardous enterprise, was yet regarded by the Legislature as an unsafe investment of trust funds; otherwise, there would have been no occasion for providing so carefully for the separation of the trust department from the banking department. But, if there is an actual mingling of trust funds with ordinary deposits, the only separation being in the method of book-keeping, the trust funds are exposed to the same hazards as ordinary deposits. It is true, special certificates of deposit are issued by the banking department, and filed in the trust department. It will scarcely be claimed, however, that in the event of insolvency in the banking department these certificates would have any priority over other deposits. If a loss occurred, the trust department would stand, at most, with other depositors, as a general creditor. In so far, therefore, as the company, under any form of deposit, mingles trust funds, and the income thereof, with the funds of its banking department, it fails to comply with the letter and the spirit of the statute, which requires that "all business pertaining to such trust property shall be kept separate and distinct from its general business."

It may be claimed that deposits of uninvested trust funds and

undistributed income are temporary only, and that, inasmuch as such uninvested balance may properly be deposited with some sound financial institution, like a national bank, the company, being a sound bank, may well deposit them in its own banking department. I am not prepared to say, and the limits of your inquiry do not require me to determine, what the duty of the company is with reference to such uninvested balance. It is undoubtedly true that in the management of trust funds there will necessarily be on hand from time to time uninvested balances. These may arise from the sale of securities before opportunity of reinvestment occurs; and, also, from the fact that it is sometimes impracticable to invest at once the whole of a trust fund. As to what shall be done with such uninvested balances, the law seems to be silent. Savings banks are expressly authorized (St. 1894, c. 317, § 21, cl. 5) to deposit five per cent. of their funds in national banks. This provision, however, does not appear to be applicable to trust companies. I do not think that it can be said that the provision requiring trust companies to invest or loan trust funds in such securities as savings banks are authorized to invest in, can be said to include the depositing of such funds in national banks. A deposit subject to check is neither a "loan" nor an "investment," as those words are used by business men with reference to financial matters; nor is a deposit book a "security," in the sense in which the word is used in the statute.

But, whatever may be the duty of the trust company with reference to uninvested balances of trust funds, whether it is to keep such moneys in its vault, or to deposit them in some secure bank of deposit, I am still of the opinion that the intent of the statute is to forbid it to deposit such balances in its own bank. If it may deposit any portion of its trust funds in its banking department, the trust business to that extent, at least, is not kept "separate and distinct" from the banking business.

That this is the intent of the statute, further appears upon general considerations of policy. It is a matter of common knowledge that when there is a stringency in the money market banking institutions are often in sore need of funds to maintain their ordinary loans. If the cashier of such an institution were at liberty to add the uninvested balances of trust funds in his custody to his banking funds, the temptation would be very great at times to allow trust funds to remain uninvested, that they might thus be used. It is upon the same considerations of public policy that the law has required the separation of savings banks and general banking institutions. The sound discretion as to the investment of trust moneys which is necessarily imposed upon the trustee can only be safely exercised when he is free from all temptation to use

any portion of the moneys, either for his own purposes or for the purposes of the business in which he is engaged.

I understand that the company also claims that its proceedings are authorized by St. 1883, c. 222, § 1, which provides, among other things, that any "corporation" may deposit in trust, or otherwise, with the International Trust Company money or other property upon such terms as may be agreed upon. Under this provision it is claimed that the International Trust Company, being a "corporation," may therefore deposit its own trust funds in trust with itself. If I understand the claim of the company in this respect, it appears to be clearly fallacious. It is not for a moment to be supposed that the legislature, in so carefully guarding the trust business, and providing that it should be kept separate and distinct from its general business, intended to provide that as trustee it might deposit in its general banking department its own trust moneys in trust, to be used in such banking business. This section is to be read in connection with section 2, which regulates the manner of such deposits; and, if it were to be held, as is ingeniously claimed by the corporation, that it might deposit its own trust funds with itself in trust, said trust deposits would immediately be subject to the provisions of section 2, which still require the same separation of such funds from the general banking business that had already existed before the deposit was made. In other words, if the company were to take trust funds, which the law requires to be kept separate from its banking business, and under the authority of section 1 deposited them with itself as trustee, such deposit must immediately go back to the trust department from which it came.

Upon the whole, therefore, I am of the opinion that the company may not deposit any portion of the funds held by it in trust not otherwise invested, whether principal or income, in its banking department.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A foreign corporation organized for the purpose of carrying on business as a wholesale and retail dealer in wines, malt and spirituous liquors, cigars and tobacco and also as a licensed victualler, is entitled to file with the commissioner of corporations the power of attorney and other papers provided for by St. 1884, c. 330.

MAY 25, 1896.

Hon. CHARLES ENDICOTT, *Commissioner of Corporations.*

DEAR SIR: — Your letter of the 18th inquires whether the Boston Wine and Spirits Company, a corporation organized under the

laws of West Virginia, may, under St. 1894, c. 381, be allowed by you to file in your department the papers provided for by St. 1884, c. 330.

The company in question appears by its charter to be organized "for the purpose of carrying on business as a wholesale and retail dealer in wines, malt and spirituous liquors, cigars and tobacco, and the business of a licensed victualler."

The corporation cannot lawfully sell intoxicating liquors in this Commonwealth. (Attorney-General's Opinions, 1895, page 94.) The business of selling cigars and tobacco, and the business of a licensed victualler, are lawful, and may be carried on by the corporation in this Commonwealth.

It is to be presumed that the corporation will in this Commonwealth engage in only such business as it may be permitted by law to do here. Inasmuch, therefore, as one of the purposes for which it is incorporated is lawful in this Commonwealth, I am of opinion that it is your duty to file the papers provided for by St. 1884, c. 330. The prohibition of St. 1894, c. 381, is only against the filing of papers of corporations "doing a business in this Commonwealth, the transaction of which by domestic corporations is not there permitted by the laws of the Commonwealth." (Attorney-General's Opinions, 1895, page 94.)

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The case of Frederick W. Brown *v.* Charles T. Russell, Jr., *et als.*, 166 Mass. 14, decided only so much of St. 1895, c. 501, commonly known as the Veterans Preference Act, to be unconstitutional as relates to the preference of veterans in filling public offices.

The decision does not embrace positions which are in the nature, not of public offices, but of public employments; and as to such positions it is the duty of the Board of Civil Service Commissioners to assume that the law is still in force.

A public officer is one who by the authority of the legislature, either through appointment or election, is charged with a duty public in its nature, and which concerns the administration of the affairs of the Commonwealth and the rights of its citizens.

MAY 26, 1896.

HON CHARLES THEODORE RUSSELL,
Chairman Civil Service Commissioners.

DEAR SIR: — Your letter of May 6th calls for my opinion as to whether St. 1895, c. 501, §§ 2 and 6, in view of the case of Frederick W. Brown *v.* Charles T. Russell, Jr., *et als.*, 166 Mass. 14, are in force with respect to certain offices and employments

set forth in your letter. The four questions you propound comprehend practically the entire classification of offices and employments which by your rules are required to be filled by certification from your department, excepting such as are plainly included within the terms of the decision in the case above quoted.

The opinion of the court in Brown *v.* Russell, Jr., *et als.*, does not hold that the Veterans Preference Act is unconstitutional as to positions in the service of the Commonwealth which are mere employments, and are not offices. It only decides that the sections under consideration, "so far as they purport absolutely to give to veterans particular and exclusive privileges distinct from those of the community in obtaining public office, cannot be upheld as enactments within the constitutional power of the general court." How far the legislature may give preference to veterans in disposing of the many employments which it creates and provides for, but which do not constitute the employee a public officer, the court in express terms refrains from deciding.

But the reasoning of the court deals almost exclusively with the question of public offices. Throughout the opinion a clear distinction is made between public offices and public employments; and the decision of the court may be fairly said to turn upon the proposition as stated in the opinion, that "it is inconsistent with the nature of our government, and particularly with articles VI. and VII. of our Declaration of Rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices."

There is no intimation in the opinion that the considerations which apply to public officers would also be applicable to mere employments. It is even suggested that such positions might be given to veterans "partly in consideration of the service they render, and partly in recognition of and as a reward for the services which they have rendered to the Commonwealth in the past."

Without venturing to express an opinion whether the distinction suggested is sound, or will be sustained by the court when the question is directly raised, I think, inasmuch as positions which are employments merely, and are not public offices, are expressly excluded not only from the reasoning of the opinion but from the decision, that it is the duty of your board to assume that the law is still in force as to such positions. The presumption in favor of

legislative acts still binds your board, excepting so far as the court has plainly instructed you to the contrary.

This raises the important question, What are public offices? Here, again, the court abstains from laying down any general rule. Indeed, Field, C. J., expressly says "it is sometimes difficult to make a distinction between a public office and an employment." As is stated by the court, the terms "public office" and "public officer" are often used, and have acquired a well-understood signification. The difficulty lies in the application of general definitions to particular cases. The determination of an individual case, especially one that is near the line, may require an examination not only of the statutes bearing upon it, but of all the facts and circumstances connected with it. I prefer, therefore, to answer your questions generally, leaving particular cases to be determined as they arise.

Among those who are declared with more explicitness by the court to be public officers may be mentioned the following: sheriff, Fowler *v.* Beebe, *et al.*, 9 Mass. 231; deputy sheriff, Bucknan *v.* Ruggles, 15 Mass. 180; coroner, Nason *v.* Dillingham, 15 Mass. 170; constable, Elliott *v.* Willis, 1 Allen, 461; public weigher of vessels, Com. *v.* Woods, 11 Met. 59; field driver, Gilmore *v.* Holt, 4 Pick. 258; assessor, Pease *v.* Smith, *et al.*, 24 Pick. 122; surveyor of highways, Williams *v.* Adams, 3 Allen, 171; postmaster, Keenan *v.* Southworth, 110 Mass. 474; commissioners appointed by the governor, Fitchburg Railroad Co. *v.* Grand Junction, etc., Co., 1 Allen, 552; town liquor agent, Dwinells *v.* Parsons, 98 Mass. 470; county commissioners, New Haven and Northampton Co. *v.* Hayden, *et als.*, 117 Mass. 433; district attorney, Bullock *v.* Aldrich, 11 Gray, 206; city physician, Com. *v.* Swasey, 133 Mass. 538; city engineer, Chandler, *et al.*, *v.* Lawrence, 128 Mass. 213; town clerk and moderator, Attorney-General *v.* Crocker, *et als.*, 138 Mass. 218; road commissioner, Clark *v.* Easton, 146 Mass. 43; police officer, Phillips *v.* Boston, 150 Mass. 491, 494; and master of house of correction, and superintendent and instructor thereof, O'Hare *v.* Jones, *et als.*, 161 Mass. 391. On the other hand, the court says, in Brown *v.* Russell, Jr., *et als.*, that "every copying clerk or janitor of a public building is not necessarily a public officer." From these illustrations, and upon general considerations, it may be said that a public officer is one who by the authority of the legislature, either through appointment or election, is charged with a duty public in its nature, and which concerns the government of the state and the rights of its citizens. Whoever is entrusted with powers which concern the administration of the affairs of the Commonwealth, or the rights of

the public, and is appointed or elected to that duty under legislative authority, may be said to be a public officer. Whatever just criticism may be made upon this definition is yet, I apprehend, more properly directed against the attempt to define than the definition itself. It is not easy to lay down any rule which may not be subject to modifications in view of specific facts.

Applying these principles to the classifications referred to in your letter of inquiry, it is not difficult to decide that those included in the second division, schedules C and D, to wit, laborers, are not public officers. Nor can it be properly said, in my judgment, that those described in schedule A, which includes clerks, copyists, recorders, book-keepers, agents, etc., hold public offices. So far as I am informed of the facts, I do not see how it may be said that foremen of laborers, engineers, janitors, persons having charge of steam boilers in school buildings, turnkeys, watchmen, drivers of prison wagons, gatemen, or guards in public parks and ferries, are public officers. The duties of all these are rather in the nature of employments than offices. They take no part in government. They do the work of the Commonwealth. They are its employees, not its officers.

On the other hand, truant officers, although exercising a limited jurisdiction, are yet charged with responsible and important duties. They are directed (St. 1894, c. 498, § 20) to make complaint for truancy, and to carry into execution the judgment thereon; to serve all legal processes issued by the court; also (§ 23) to apprehend and take to school without a warrant all truants found wandering about the streets. They are clothed with authority, and "have and exercise some powers of government." (Field, C. J., in Brown *v.* Russell, Jr , *et als.*)

The position of drawtender is also one which directly concerns the rights of the public. Pub. Sts., c. 53, § 30, provides that a drawtender shall have full control of passing vessels through the draw, having due regard for the public travel, and shall enforce the ordinances or by-laws relating to the same. This makes him, in my judgment, a public officer. (*Vid.* Nowell, *et ux.*, *v.* Wright, 3 Allen, 166.)

I am aware that in the foregoing distinctions I have not exhausted the list of positions upon which your letter calls for my opinion. To do so would require a more intimate knowledge of the statutes relating to those I have omitted, and the facts bearing upon the duties of them, than I now have. In referring to some classes, I did so rather by way of illustration of the general principles stated than as attempting to cover the whole ground. If cases arise, which, notwithstanding the foregoing principles, seem to

you to be doubtful, I will attempt to deal with them specifically, if desired.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

Under St. 1892, c. 243, the town of Plainfield may be reimbursed by the Commonwealth for the support of an insane pauper, including interest on the amount due, if payment was withheld for any reason; but not for costs of court in defending a suit in which the settlement of the pauper was determined, nor for fees of witnesses and attorneys in said suit.

JUNE 4, 1896.

His Honor ROGER WOLCOTT, *Lieutenant-Governor, Acting Governor.*

DEAR SIR: — I have the honor to acknowledge the receipt of your letter of the 3d, asking my opinion as to the extent to which the Commonwealth may reimburse the town of Plainfield for the support of one Ida Thayer, an insane pauper, under the provisions of St. 1892, c. 243. The bill accompanying your letter is for support for one hundred and eighty-one weeks; for interest paid by the town upon the bill for said support; for costs of court in defending a suit in which the settlement of the pauper was determined; and for the fees of witnesses and attorneys in the same case. The case is reported in Massachusetts reports, vol. 164, page 506.

The statute in question provides that the Commonwealth may reimburse towns under a certain valuation the amounts expended by them for the support of insane paupers. Plainfield is within the terms of the act. The amount expended, therefore, for support, including, perhaps, interest on the amount due, if payment was withheld for any reason, is a proper charge against the Commonwealth, and a warrant therefor may lawfully issue.

But the items for costs of court and attorneys' and witnesses' fees are not, in my judgment, within the terms of the statute. It is true the suit was decided with the hope of establishing the settlement of the pauper in Northampton rather than in Plainfield; and if the town had prevailed, the Commonwealth would have been relieved from the burden of her support. However just it might be considered to be on general principles for the Commonwealth to pay the expense of litigation, there seems to be no authority for it in the statute. The word "maintenance" refers to the support of the pauper, and does not mean the maintenance of a law suit.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A contract with the owner of a bicycle to furnish him a substitute in the event of his own being stolen, the bicycle to be a duplicate of the original and to be returned only upon the recovery of the latter, is an insurance contract within the meaning of St. 1894, c. 522, § 3.

June 15, 1896.

Hon. George S. Merrill, *Insurance Commissioner.*

Dear Sir: — I have your letter of the 12th, asking whether, in my opinion, the contract of the American Wheelmen's Protective Association, a copy of which is submitted with the letter, is an insurance contract, under St. 1894, c. 522, § 3.

From an examination of the copy submitted it appears to be an undertaking by the association, in consideration of a stipulated payment in cash, to furnish to the holder of the contract, whenever his bicycle is stolen from him, another bicycle. It is expressed in the contract to be a loan of a duplicate of the stolen bicycle, the same to be returned upon recovery of the original. The use of this expression, however, does not in any way modify the essence of the contract. It is, in fact, an undertaking to insure the holder of the policy against the loss of his bicycle by theft. This is insurance at common law. An insurance contract is a contract of indemnity against possible loss, whether the loss occurs by injury, destruction, death or theft; and whether the agency of destruction is fire, water, disease or burglary. (*Vid.* Wilson *v.* Hill, 3 Met. 66, 68; May on Insurance, vol. 1, c. 1, § 1, c. 6, § 73; Vol. 2, c. 30.)

The only possible doubt upon the question stated is whether the definition of insurance given in St. 1894, c. 522, § 3, is intended to limit the meaning of the word as it is understood at common law. Insurance in that statute is defined as follows: "An agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest."

This definition first appears in St. 1887, c. 214, § 3. It was taken from an opinion of Gray, C. J., in Com. *v.* Wetherbee, 105 Mass. 149, and was undoubtedly adopted by the legislature as a judicial interpretation of the meaning of the word; but an examination of the case cited shows that it was not intended in the opinion to limit the common-law definition of insurance. In the same opinion the chief justice said: "All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency

contemplated in the contract." A strict construction of the word "insurance," used by the chief justice, would exclude loss by theft; but it is obvious from an examination of the whole opinion that the chief justice intended no such limitation. (*Vid.* May on Insurance, vol. 1, sec. 1.)

The established legislative practice also has been to regard such contracts as insurance contracts. St. 1894, c. 77, "An Act to incorporate the New England Burglary Insurance Company" for the purpose of guaranteeing individuals against "loss and damage by burglary or housebreaking." (*Vid.* St. 1895, c. 474.)

As commonly used, the words "destruction or injury" do not include "theft;" but in view of the origin of the definition, and of the ordinary meaning which attaches to the word insurance, I am of opinion that insurance against loss by theft is to be regarded as within the statutory definition. The possession of the bicycle is property which vests in the owner; this possession is destroyed by theft of the bicycle.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

A member of the house of representatives is ineligible for appointment to the office of insurance examiner created by St. 1896, c. 335, during the term for which he is elected.

JULY 2, 1896.

Hon. GEORGE S. MERRILL, *Insurance Commissioner.*

DEAR SIR: — I have your letter of the 30th ultimo, inquiring whether the office of examiner for the insurance department, created by St. 1896, c. 335, is such an office as is described in Pub. Sts. c. 2, § 33, so that a member of the house of representatives for 1896 is ineligible to appointment.

Pub. Sts., c. 2, § 33, provides: "No member of the Senate or House shall, during the term for which he is elected, be eligible to any office under the authority of the Commonwealth created during such term, except an office to be filled by vote of the people." The obvious purpose of this statute is to remove from a member of the legislature any temptation to be influenced in his vote by reason of the possibility that he may be a candidate for the place created by the legislature of which he is a member.

The office of insurance examiner, created by St. 1896, c. 335, is plainly within both the spirit and the letter of the public statutes. It is an office the appointment to which must be approved by the governor and council and the salary of which is to be paid out of the treasury.

As to your further inquiry whether a representative can resign his office after the prorogation of the legislature, so as to become eligible to such an office, the statute provides that he shall be ineligible "during the term for which he is elected." A representative is elected for the political year beginning the first Monday in January; he is therefore ineligible during the entire year. It is unnecessary to consider whether he can resign without the consent of the body of which he is a member, although the authorities are against such a proposition. (*Vid.* Fitchburg Railroad Co. *v.* Grand Junction Railroad & Depot Co., 1 Allen, 552.)

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The property acquired under Res. 1896, c. 118, is to be used as part of the Lyman School.

JULY 7, 1896.

Mrs. ELIZABETH G. EVANS, *Secretary.*

DEAR MADAM: — I have the honor to acknowledge your request for an opinion as to whether the property acquired under Res. 1896, c. 118, can be used as a part of the Lyman School.

The resolve in question is entitled a "RESOLVE TO PROVIDE FOR THE PURCHASE OF ADDITIONAL PROPERTY FOR THE LYMAN SCHOOL FOR BOYS," and reads as follows: —

Resolved, That there be allowed and paid out of the treasury of the Commonwealth a sum not exceeding eight thousand five hundred dollars, to be expended under the direction of the trustees of the Lyman school for boys, for the purchase of the so-called Flagg farm in the town of Berlin, and for the proper repairing and furnishing of the buildings situated thereon.

The enactment means what it says, namely, that it is for the purpose of providing for the purchase of additional property for the Lyman school. Additional property of the Lyman school is to be used as a part of the Lyman school.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

In St. 1896, c. 515, the specific exception in sections 5 and 7 are not to be regarded as annulled by the general exception in section 10 of the same, but are confirmed thereby, and the act is to be construed as though no such specific exception had been made.

JULY 13, 1896.

Hon. GEORGE S. MERRILL, *Insurance Commissioner.*

DEAR SIR: — Your letter of June 19th requests my opinion upon the construction of St. 1896, c. 515, §§ 5, 7 and 10. Section 5

provides that no assessment corporation except those "engaged in the business of accident insurance" shall enter into certain contracts. Section 7 provides that policies shall not be issued upon the life of any person more than sixty years of age, provided "that such corporations which insure against accident only may issue policies or certificates on the lives of persons not over seventy years of age." Section 10 provides, generally, that the provisions of the act shall not apply to companies "transacting only an accident or casualty business upon the assessment plan." Your inquiry is "in what condition these apparently contradictory sections leave accident companies as regards the provisions of sections 5 and 7 of said act."

I do not consider the sections as being even "apparently" contradictory. They are not well drawn; but the meaning of the whole act is not difficult to discover. Sections 5 and 7 specifically except accident insurance companies from the provisions of those sections; while section 10, apparently ignoring the fact that such exceptions had been made in sections 5 and 7, exempts accident insurance companies from all the provisions of the act. The specific exceptions in sections 5 and 7, are not to be regarded as annulled by the general exemption in section 10, but are confirmed. The act is to be construed as though no specific exceptions had been made in sections 5 and 7.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

The extension of time limits provided for in St. 1895, c 464, § 8, entitled "An act to incorporate the Massachusetts Ship Canal Company," does not extend the period of six months within which the company was required to make its deposit with the treasurer and receiver-general; and a failure to make such deposit within said six months renders the charter null and void.

JULY 13, 1896.

Hon. E. P. SHAW, *Treasurer and Receiver-General.*

DEAR SIR: — Your letter of the 27th asks whether, in my opinion, it is your "duty, as treasurer and receiver-general of the Commonwealth of Massachusetts, to receive the deposit required by chapter 464 of the Acts of 1895 from the Massachusetts Ship Canal Company at the present, or at any subsequent time."

The Massachusetts Ship Canal Company was incorporated by St. 1895, c. 464. Section 23 of said act is as follows: "The provisions of this act shall be null and void unless said canal company deposits with the treasurer of the Commonwealth the sum of one hundred and fifty thousand dollars within six months after the

passage of this act, which sum shall be forfeited to the Commonwealth unless the work of construction is commenced within one year and completed within five years from the passage of this act. Said sum of one hundred and fifty thousand dollars shall be refunded to said canal company when said canal is in operation, if not forfeited under the provisions of this section." The act took effect June 4, 1895. No deposit, or tender of deposit, was made within six months thereafter. The charter, therefore, is void unless the time has been otherwise extended.

I understand it to be claimed, however, by the company that the time is extended by the provisions of section 8. That section provides that the corporation shall within six months from the passage of the act apply to the boards of railroad commissioners and the harbor and land commissioners as a joint board, "to determine what provision shall be made by the canal company for the crossing of said canal by the New York, New Haven & Hartford Railroad Company, and at what point such crossing shall be made by a railroad drawbridge, and for crossings for the public where the canal cuts through highways." It is further provided that said joint board shall determine said matters, and shall decide what arrangements shall be made for the temporary crossing of the location of the canal company while the drawbridge is being built, and shall further decide at what time the railroad company shall commence to use the new bridge and its approaches. The section then provides that "the time taken by said joint board from the date of said petition to said joint board to the date of their decision shall be taken as additional time to all time limits and requirements set forth in this act."

I am further informed that a petition was duly filed, as required by said section 8, with the boards of railroad commissioners and the harbor and land commissioners, to wit, on the ninth day of November, 1895; and that no decision has been filed by said joint board. If, therefore, the time taken by the joint board from the date of the petition to the date of its decision is to be added to the limit of six months within which the deposit is to be made, as provided in section 23, then the company may still make the deposit.

The question raised by the company, therefore, is, whether the provision that the time so taken by the joint board "shall be taken as additional time to all time limits and requirements set forth in this act" includes the limit of six months within which the deposit is to be made. If the provision in section 8 be construed literally, the contention of the company is correct, for undoubtedly the period of six months within which it is provided the deposit is to be made is one of the "time limits and requirements set forth in this act."

I am of the opinion, however, that the section is not to be construed as referring to all time limits set forth in the act, but only to such time limits as would be affected by delay in the action of the joint board. For example, the act provides that work shall be begun within one year, and that the canal shall be completed within five years. It may be said, however, that the company could not reasonably be expected to begin its work until the determination of the questions raised by the petition to the joint board; and, further, that if the board should be a long time coming to a decision it might prevent the canal company from completing its work within the prescribed period of five years. The legislature, therefore, undoubtedly intended that these limitations as to beginning and completing the work should be increased by whatever time might be occupied by the joint board in coming to a decision.

It cannot be said, as claimed by the company, that the expression "all time limits and requirements set forth in this act" is to be construed literally as covering all such limitations. Section 19 of the act provides that no taxes are to be paid either to the Commonwealth or to the towns until the expiration of three years after the canal shall have been opened for use. It is obvious that whatever loss of time might be caused by the delay of the joint board in coming to a decision has no effect upon this limitation as to taxation. Indeed, section 8 provides that the petition to said joint board shall be filed within six months from the passage of the act. Although this is a time limit, it would not, of course, be claimed that it is extended, or could be extended, by the time occupied by the joint board in reaching a decision.

It is matter of history that many companies have been granted charters for the construction of canals across Cape Cod, and that without exception all have failed to carry out the purposes for which they were incorporated. Some of them have encroached upon private and public rights; and in more than one case the holding of an unused charter by a corporation has been the means of preventing the incorporation of another enterprise. This being so, it is obvious that the legislature, in granting a charter to the Massachusetts Ship Canal Company, intended to impose upon the company the performance of certain things as a guarantee of its good faith, and of its purpose to carry out the work it was chartered to do. The construction of a canal across the Cape is a work which would benefit the public; and, many companies having been chartered and having failed to carry out their work, these conditions and limitations were imposed upon this company so that it should soon be known whether the company intended to build the canal;

and, if so, to make it expensive for the company to abandon the work having once entered upon it.

It was provided by section 4 that the corporation should file its location within six months from the passage of the act, defining courses, distances, and boundaries; by section 8, as above stated, that it should apply to the joint board provided by said section for the location of railroad and highway crossings; by section 20, that $500,000 of the capital stock should be subscribed for before the first day of December, A.D., 1896, and $100,000 be paid in and actually used for the construction of the canal; and by section 23, that the sum of $150,000 should be deposited with the treasurer, to be returned without interest when the canal was in operation, but to be forfeited unless the work was begun within one year and completed within five years from the passage of the act. All these provisions are intended to secure the actual inception of the undertaking within six months, undoubtedly so that the enterprise should not stand in the way of a new charter if the conditions imposed upon this company were unfulfilled before the beginning of the next legislature. The location of the railroad and highway crossings provided to be decided by the joint board is a matter which has nothing to do with the inception of the work, and is only incidental to its progress and completion. The filing of the location, which must be done within six months after the passage of the act, not only would not be delayed by the action of the joint board, but, on the other hand, no petition could well be filed with the joint board until the location itself were determined. Nor is the subscription to the capital stock in any way related to the action of the joint board. It may be that the provision that $100,000 should be actually used for the construction of the canal before the first day of December, 1896, might be said to have some relation to the decision of the joint board; also, as above stated, the provision that the work should be begun within one year and completed within five years.

But the provision that a deposit should be made in the treasury is required as a guarantee that the corporation had a bona-fide intention to carry out the work it was chartered to do. To accept the contention of the company would require me to hold that the legislature intended that the company need not pledge itself to build the canal until the decision of the joint board was filed. This was not, in my judgment, the intent of the provision.

I am of opinion, therefore, that the extension of time limits and requirements provided for in section 8 only relates to such time limits and requirements as would be affected by delay in the action of the joint board, and that it does not extend the period of six

months within which the company was required to make a deposit with the treasurer and receiver-general.

The charter, therefore, under the conditions set forth in section 23, has become null and void, and the company incorporated by said charter has no right to make the deposit with you.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

A foreman of laborers as classified in Class 6 of Schedule B of Civil Service Rule VI. is a person who has immediate charge and oversight of a gang of laborers, directing them in their work and seeing that they keep at work.

The duties of the superintendent in the income division of the water department of the city of Boston and those of the superintendent of inspectors in the permit division of the department of streets, as appears from the facts stated below, are not such as to bring those officers within the classification established by the civil service rules.

JULY 17, 1896.

Hon. CHARLES THEODORE RUSSELL, *Chairman.*

DEAR SIR: — Your letter of May 16th states certain facts with relation to three persons recently appointed to office in the city of Boston, without certification by your board, and asks my opinion as to whether, upon those facts, they were legally appointed in view of the statutes and rules relating to the civil service. Your letter further asks "what, if any, is the distinction between a 'superintendent' in a city department, under a commissioner or head of the department, and a 'foreman,' as classified in Class 6 of Schedule B of Civil Service Rule VI."

It is not always practicable to lay down general definitions sufficiently broad and precise to cover all possible cases that may arise. It has been the practice of this office to refrain from attempting to reply to inquiries calling for a statement of general principles, but rather to determine specific questions as they arise. The general question in your letter above quoted is within this rule. To undertake to lay down in advance a clear distinction between a superintendent and a foreman is not practicable nor necessary. It is possible, however, to establish some general principles of construction of the meaning and intent of the civil service statutes, and of the rules created by your board in pursuance of those statutes, which may be of assistance in the consideration of specific cases.

The civil service rules have, and are intended to have, only a limited application. Your board has not undertaken, in the classification established by its rules, to comprehend all the departments of public service with which under the statutes it is authorized to deal. This right of limited application is recognized by the court. (*Vid.* Opinion of the Justices, 138 Mass. 601.) Certain offices are excepted from the operation of the civil service rules by law. St. 1893, c. 95, expressly exempts, among others, "heads of any principal departments of the Commonwealth or of a city." Subject to this and perhaps to some other exception in the same statute, all the appointive officers in a city government may be classified by your rules. I do not understand, however, that you have attempted so to include the entire civil service of cities. On the contrary, there are many officers, not heads of principal departments, who are not classified under your rules. There are officers exercising duties of supervision, superintendence and inspection, who, on the one hand, do not come within the exception of the statutes exempting them from your rules; and who, on the other hand, are clearly not within the classifications established by the rules. (*Vid.* Opinions of the Attorney-General, Oct. 12, 1892; Dec. 4, 1894.) So far as the question under discussion is concerned, your rules only attempt to classify such officers as are designated as "foremen and sub-foremen of laborers" and "inspectors of work."

I assume that your general inquiry is intended to suggest the question whether there is any intermediate ground between persons who are "heads of principal departments," under the statute of 1893, and who are thereby exempted from the rules, on the one hand, and "foremen and inspectors," on the other hand, who are in the classified service. If the classification of your board were intended to be comprehensive, there might be some ground for holding that it was intended to include all persons doing the work of superintendents between the grade of a head of a principal department on the one hand, and actual laborers on the other hand. But your rules, as before stated, are intended to have a limited application only; and it cannot be said, therefore, that such intermediate superintendents are to be classed as foremen unless the meaning of the words "foremen" and "inspectors" actually requires such an interpretation.

There is no absolute line of distinction between a superintendent and a foreman. A foreman is a superintendent in one sense of the word; and a superintendent may not improperly be called a foreman. But the word "foreman," in your rules, is to be taken n its usual and ordinary signification. As the word is commonly

employed, it undoubtedly means a person who has immediate charge and oversight of a gang of laborers, directing them in their work and seeing that they keep at work. On the other hand, a superintendent, as applied to civil officers, is one who has charge and oversight of a department of government, either a principal or a subordinate department. He is an officer to whom is entrusted responsibility, judgment and skill. The distinction between a foreman under your rules and a superintendent was well suggested by my predecessor, Mr. Pillsbury, when he said, speaking of the rules of your board, "it appears to me that the civil service act and the rules should, in general, be so construed as to distinguish between positions of routine, so to speak, which ordinarily do not involve administrative or discretionary powers, on the one hand, and, on the other, positions which involve the exercise of judgment, discretion, authority and responsibility; and that the general scheme is to include the former and not to include the latter class within the system." (Attorney-General's Opinions, 1892, Oct. 12.)

This general distinction seems to me to be sound. A foreman of laborers is entrusted only with the duty of seeing that his men keep at work. The meaning of this word is fixed and modified by the clause "of laborers" which follows and limits it. A superintendent has the general charge and oversight of the work of a department, especially in its relation to the public, for whose benefit the department was created; and under the authority of his chief, if he, himself, is not the head of the department, represents the administration of the government.

The foregoing principles appear to me to be conclusive of two of the three cases submitted in your letter.

M. J. O'Brien has been appointed "superintendent in the income division" of the water department. His duties, as they appear by the letter annexed to your communication, the statements of which for the purposes of this inquiry I am to take as conclusive, are to have charge of the Deacon system and waste of the water department. This division employs twenty or thirty laborers, some of whom are experienced, two to four foremen, some inspectors, a clerk and an engineer. This division is intended to enforce the provisions of St. 1895, c. 488, § 10, which provides that the board "may inspect the water works and fixtures in any city or town supplied wholly or in part from the works under their charge, and may take all proper measures to determine the amount of water used and wasted, and to prevent the improper use or waste of water."

On these facts, I do not think that it can properly be said that O'Brien is merely a foreman of laborers. He has charge of a

department of work comprising laborers, inspectors, a clerk and an engineer. His duties are not merely to see that laborers work faithfully; they comprehend the administration of the powers and duties of the government, so far as they relate to waste in the public water supply.

Edward Hayden has been appointed "superintendent of inspectors in the permit division" of the department of streets. His duties, as stated in the letter annexed to your communication, comprise the control and supervision of the force of inspectors, clerks and messengers, working on permits issued by the permit division to any other department of the city, or to any corporation or company which requires a permit for the opening or use of the public streets. A number of this force are paid by corporations requiring the opening of the streets, although they are appointed by the superintendent of streets and are under his control. It is stated to be the further duty of Hayden to go about the city and superintend the work being done under the inspectors, and report to the superintendent of streets upon the condition of the work.

These duties obviously require not merely vigilance in keeping laborers at work, but oversight, discretion and judgment as to the general plan of the work to be done. On the facts I am unable to say that Hayden is within the classification of foremen of laborers; he is that, and much more.

Timothy F. Murphy has been appointed "superintendent of the patrol division" of the street department. The letter annexed to your communication states that "he has full charge of the push-cart division of the entire city, and is responsible for the faithful performance of the work done by this division, personally visiting the several districts covered by the regular men daily."

This somewhat meagre enumeration of the duties of Murphy is not sufficient to enable me to determine whether he is anything more than a foreman, or not. Apparently his duties consist merely in seeing that the men under him keep at work. If so, he is a foreman of laborers, with sub-foremen under his charge, and should be appointed under the civil service rules.

It is further stated, in the letter which purports to enumerate his duties, that an extension of the system is contemplated, under which the entire city will be included in Murphy's department, and an additional force of foremen and inspectors employed. The letter to which I refer was dated May 9. Whether any such extension as is proposed in the letter has been made, or not, I have not been informed. If further consideration of Murphy's case is desired, I must request to be advised more fully upon the facts.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The number of steam rollers and portable stone crushers which the Massachusetts highway commission may be required to furnish under the provisions of St. 1896, c 513, is to be decided by the applicants and not by the commission.

Upon a request made in conformity with said chapter for road machines other than steam rollers and portable stone crushers, the said commission is vested with discretionary power either to comply with or to refuse such request.

July 22, 1896.

Massachusetts Highway Commission, A. B. Fletcher, *Clerk.*

Dear Sir: — I take pleasure in acknowledging your communication of July 21, requesting an interpretation of St. 1896, c. 513.

The first question is, whether your commission has any discretion in the matter of granting requests made by the county commissioners for steam rollers and other machines, or whether it is obligatory upon it to comply with each request as made.

The power of the Massachusetts highway commission in relation to this matter is to be gathered from St. 1895, c. 486, and St. 1896, c. 513. Under chapter 486, just cited, the Commonwealth was obliged to furnish one steam road roller whenever an application conformable to law was made by a town. St. 1896, c. 513, repeals this act, and enacts that "Upon the application to the Massachusetts highway commission of the county commissioners of any county, made at the request of any town of not more than twelve thousand inhabitants within said county, there shall be furnished by said highway commission to said county, at the expense of the Commonwealth, one or more steam rollers, portable stone crushers and such other road machines as the said highway commission may deem necessary for the construction and maintenance of better roads in the town making such request."

I can see nothing in this sentence, or the rest of the act, which leads me to believe that the duty of furnishing at least one steam roller, whenever a legal application has been made, is not obligatory upon the commission.

Furthermore, I am of the opinion that the number of steam rollers and portable stone crushers needed is to be decided by the applicants, and not by the highway commission. The grammatical construction of the sentence, and the purport of the law, taken as a whole, coincide in my mind in justifying this construction. The position of the words, and particularly the use of the words "such other road machines," leads me to believe that the discretionary power vested in the highway commission applies only to "such other road machines as the said highway commission may deem necessary." Furthermore, the necessity of speed

in the construction is essentially of local importance, and is generally guided entirely by local considerations. Taking this into consideration, with the fact that the town is ultimately to pay for the maintenance and management of the machines, I am of the opinion that the commission has no discretion upon any given occasion to decide upon the number of steam rollers and portable stone crushers which shall be required.

In reference to requests for road machines other than steam rollers and portable stone crushers, my opinion is that the commission is vested with discretionary power in the matter of granting or refusing such requests.

In your second question you ask whether your commission has any control over the machines furnished in accordance with St. 1896, c. 513, after they have been delivered to the county commissioners. In reply to this only a general answer can be given. The machines still remain the property of the Commonwealth, but such control as is necessary for their management and maintenance is vested in the county commissioners. Whether in a given case the control sought to be exercised is one of management and maintenance, or not, is a question that can be answered only when a specific case arises.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The auditor of the Commonwealth is required, under St. 1896, c. 550, to charge to the account of the fund created by the metropolitan park loans heretofore authorized such a sum as will be sufficient to meet the interest and sinking fund requirements up to and including the first day of January, 1900, and also to charge to the said account all amounts heretofore appropriated for the care and maintenance of metropolitan parks.

He is not required under the said statute to set apart any portion of the said fund for the future care and maintenance of the said parks.

JULY 23, 1896.

Hon. JOHN W. KIMBALL, *Auditor.*

DEAR SIR: — Your letter of June 22 requests my opinion as to the construction of St. 1896, c. 550, relative to the metropolitan parks and boulevards. In order to understand the questions raised it is necessary to review the legislation relating to metropolitan parks.

The metropolitan park commission was created, and authorized to lay out and construct parks, by St. 1893, c. 407. By section 9 of that act a loan of one million dollars was authorized for a term

not exceeding forty years, "to meet the expenses incurred under the provisions of this act." It was not the purpose of the legislature, however, to impose the burden of the laying out, construction or maintenance of the metropolitan parks upon the Commonwealth. A policy of reimbursement from the cities embraced within the metropolitan parks was established in the original act, which has never been departed from in any subsequent legislation. The act in question provided that a special commission should be appointed, for the purpose of determining substantially the proportion in which the expenses of metropolitan parks should be borne by the cities and towns in the metropolitan district. The proportion assessed upon Boston was to be fifty per cent. of the whole. The proportion to be assessed upon the other cities and towns was to be determined by this special commission so constituted. A sinking fund was created by the act authorizing the loan, the annual contributions to which should be sufficient to extinguish the debt at maturity. Section 12 of the act provided that the amount of money required each year from the cities and towns in the district to meet the interest, sinking fund requirements and expenses for each year, should be estimated by the treasurer in accordance with the proportion established by the special commission, and assessed upon such cities and towns as a portion of their state tax. By the operation of this plan, therefore, although all the moneys required for metropolitan parks was to be raised by the Commonwealth by means of a loan, and advanced when necessary, the whole of the principal and interest of said loan, and the expenses of maintaining the parks, were eventually to be assessed as a tax in the proportion thus ascertained upon the cities and towns of the district.

A special commission was thereupon appointed by the supreme judicial court, which proceeded to hear the parties, and to assess the proportion to be paid by each city and town within the district. This report was ultimately confirmed by the court. From time to time additional authority to expend money in laying out and constructing parks and parkways was granted to the commission, and loans for corresponding amounts authorized to be made by the treasurer to meet the expenses thereof, the whole amount of loans, so authorized, being $4,300,000. The last loans voted were by St. 1896, chapters 466 and 472. By chapter 466 the park commission was authorized to "expend the further sum of one million dollars, in addition to all sums heretofore authorized to be expended by it;" and to meet the expenditures so authorized to be incurred the treasurer was directed to issue a corresponding amount of scrip or certificates of indebtedness. By chapter 472 the commission was authorized to expend the further sum of five hundred

thousand dollars for roadways and boulevards, and a corresponding loan was authorized to be made by the treasurer. The acts were approved June 4, 1896, and took effect upon their passage.

Under the act creating the park commission (St. 1893, c. 407) it was directed to estimate annually the expense of preservation and care of the parks for the ensuing year, and certify the same to the treasurer, such expenses to be apportioned among the cities and towns in the same manner as the expenses of location and construction. This estimate was limited in the original act at twenty thousand dollars, but the limitation was afterwards removed. In pursuance of this authority, estimates have been made by the commission from time to time, and the legislature has each year appropriated sums of money to be paid out of the ordinary revenue for the care and maintenance of the parks, to wit: 1894, $20,000; 1895, $37,000; 1896, $40,000. Under the statutes of appropriation these sums were not taken from the park loans, but were imposed upon the cities and towns in the district, in addition to the amounts authorized for laying out and construction.

Complaint was made by some cities and towns that the apportionment established by the commission was necessarily premature, being made before the completion of the work of laying out and constructing the parks, and, therefore, possibly unfair. The statute under consideration (St. 1896, c. 550) was undoubtedly passed in recognition of the justice of these complaints. It does not undertake to change or modify the purpose originally declared by the legislature of assessing the expenses of the laying out, construction and maintenance of metropolitan parks upon the cities and towns within the district, but it abolishes the work of the special commission above referred to. It further directs the park commission to lay out and construct all the parks which it is authorized to construct before the first day of January, A.D. 1900; and further provides that during the year 1900 a new special commission shall be appointed to assess the proportions to be paid by the several cities and towns in the district, in the same manner as was provided by the original act. The necessary intent of this law is, not to impose any part of the burden of metropolitan parks upon the Commonwealth, but to postpone the time when the cities and towns shall begin to reimburse the Commonwealth for the money advanced by it for that purpose. But, inasmuch as it would be onerous to require the cities and towns in the district to pay in one sum all the interest and fixed charges, and expenses of maintenance incurred from the beginning of the enterprise up to the year 1900, the act provided that all these charges and expenses should be paid by the treasurer out of the loans authorized. The result

of this will be that in the year 1900 the only demand upon the cities and towns will be the bonds then outstanding, the interest, sinking fund requirements and all expenses of care and maintenance accruing prior to that time having been paid out of the loan itself. It follows that the time of beginning reimbursement to the Commonwealth by the cities and towns is thus postponed for four years; but as a necessary result of this either the amount to be expended for parks and boulevards must be reduced, or the amount to be paid by the cities and towns must be increased. This is because the whole sum which the cities and towns assume from and after the first day of January, 1900, includes all interest and sinking fund requirements and expenses of maintenance to that date, these sums being necessarily either added to the whole loan, which is thus made greater, or taken from the loans now authorized.

The question stated in your letter is this, substantially: Is it the intent of the act that the loans heretofore authorized shall be increased by the amount of the interest, sinking fund requirements and expenses of maintenance already incurred, and to be incurred between now and the year 1900, or are those expenses to be deducted by you from the fund created by the loans already authorized? The question is one of importance, because the necessary result of deducting all the charges and expenses so imposed upon the loan itself is to cripple seriously the work of the park commission by diminishing the amount of money placed at its disposal by previous acts, the last of which was enacted June 4, only five days before the act in question took effect. If you are to reckon only such expenses as already have been authorized, and the interest and sinking fund requirements now contracted for, the amount to be deducted from the fund created by the park loans will be, I am informed, about $700,000. If the statute requires you to go further, and deduct such sums as you estimate will be required for expenses from this time until the year 1900, the amount to be deducted will be about $950,000, or nearly the whole amount which the commission was authorized to expend upon parks, under the authority of the act of June 4 passed by the same legislature.

It is claimed by the park commission that it is inconceivable that the legislature on the fifth day of June should authorize the commission to expend the sum of one million dollars, and on the ninth day of June practically take away this power. The act of June 5 was passed after a careful consideration of the purposes and needs of the commission. I am told that it was stated by the park commission to the legislature that the sum of one million dollars was needed to complete the parks according to the plans

under consideration before them; and the statute of June 5 giving them that sum must be taken to be a recognition by the legislature of the needs of the commission at that time.

The park commission claim that both acts must be construed to stand rather than fall, and that the latter act must be taken to be an authority, express or implied, for an additional loan by the treasurer to meet the charges and expenses so imposed upon the loan itself.

There is much force in this contention, but the difficulty in the way is that it is not sustained by the plain language of the last statute, being the one under consideration. Section 1 of this statute provides, in express terms, that "the treasurer of the Commonwealth shall pay from the proceeds of the *loans authorized*" all moneys required up to and including the first day of January, 1896, to meet interest and sinking fund requirements, and cost of maintenance. The legislature of 1896 cannot be said to have required the treasurer to speculate upon the chances that a future legislature would authorize an additional loan. The words "loans authorized" cannot be construed to mean loans hereafter to be authorized. A loan is not authorized until the act therefor is passed by the legislature; and I cannot advise you that the legislature of 1896 gave you any ground by the language of section 1 to expect that an additional loan would be authorized by a future legislature. A legislative body cannot bind its successor, nor can it authorize the officers of the government to act in anticipation of what may be authorized by a succeeding legislature.

Still less can the section be said to be a present authority for an additional loan. The language not only does not warrant such an inference, but it plainly points to the contrary; it directs the treasurer to pay the charges in question out of the "loans authorized," not out of loans to be created therefor.

I am of opinion, therefore, that it is your duty to transfer to the account of the fund created by the metropolitan park loans heretofore authorized, such a sum of money as will be sufficient to meet the interest and sinking fund requirements up to and including the first day of January, 1900.

It is probable that, so far as the intent of the legislature can be ascertained from the language of the section, it was expected that further expenses of care and maintenance of the parks, as "annually authorized" by the legislature, should also be paid out of the same fund. In my judgment, however, it is impossible for you to carry out this intent. You cannot even estimate what may be the action of future legislatures. It is not sound logic to estimate from the action of previous legislatures what will be the

amount appropriated by future legislatures for care and maintenance. The general court is the sovereign, and no citizen or officer can presume in advance what its action will be. If you were to undertake to reserve any sum of money out of the park loan fund for future care and maintenance, there is no middle ground. It would be your duty to reserve the entire loan to await the action of future legislatures up to the first of January, 1900. The result of this would be to stop all work upon the parks. Notwithstanding the evident meaning of the language of the act, I am of the opinion that you are not called upon at this time to set apart any portion of the fund for future unascertained and unascertainable contingencies. It is your duty to charge the fund with all the amounts heretofore appropriated for care and maintenance. When you have done this, your duty in this respect is discharged. If a succeeding legislature shall, in the exercise of its sovereign power, appropriate a sum of money for care and maintenance of the parks, and, under the authority given by previous legislatures, all the then available proceeds of park loans have been expended by the commission for the purposes of park construction, it is to be presumed that the legislature which makes the appropriation will provide the means for its payment, either out of the ordinary revenue or by authorizing a new loan.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The secretary of the Commonwealth may not omit from the McTammany voting machines, furnished under the provisions of St. 1896, c. 498, the name of any candidate duly nominated for office.

AUG 5, 1896.

Hon. WILLIAM M. OLIN, *Secretary of State.*

DEAR SIR: — I have your letter of the 15th, asking to be advised whether it is within the power of the secretary of the Commonwealth to omit from the McTammany voting machines, to be furnished under the provisions of St. 1896, c. 498, the names of any candidates who are duly nominated for office. The importance of the inquiry arises from the fact that the McTammany machines which have been prepared for use are capable of being used for the names of fifty candidates only; whereas, in the election to be held in November it is probable that the whole number of candidates duly nominated will be one hundred and fifty. If, therefore, machines are provided for the voters' use, in order to vote thereby it will be necessary to furnish three machines in each voting place, a contingency which it may well be supposed the legislature did not foresee.

The statute in question directs the secretary, upon the request of the board of aldermen of a city or selectmen of a town to furnish to the said city or town, a sufficient number of McTammany voting machines "to enable all candidates for all offices (national, state, city or town) to be filled at such election to be voted for on such machines." I am of the opinion that, in view of the provisions of the statute above quoted, the name of no candidate who is duly nominated for office under the provisions of the statutes of Massachusetts may be omitted from the machine.

I am aware that under the provisions of the Australian ballot law all candidates for election shall be voted for upon one ballot. If, therefore, the McTammany machine were a mere device for expressing the will of the voter, each upon a separate ballot, there would be much force in the contention which might be made that more than one machine could not be used; but the McTammany voting machine does not produce distinguishable individual ballots. The choice of the voter is made by punching a hole in a certain place upon a long cardboard, the location of the punch indicating the person for whom he voted. Many voters record their choice upon the same cardboard, and there is nothing by which one individual ballot can be designated. Consequently, it is of no consequence whether the cardboards which contain the punches which stand for votes shall be large enough to receive the votes for all the candidates; or whether, on the other hand, part of the candidates are voted for on one tally sheet and part upon another, if all of the candidates for any given office are voted for upon the same sheet. The provision of the Australian ballot law which requires all candidates to be voted for upon one ballot is therefore inapplicable to machine voting.

Your letter states that it is claimed that under the provisions of St. 1893, c. 465, § 6, authority may be found for such omission. This section provides that at any election where the ballot machine is used blank ballots shall be provided for the voters, on which any voter may vote "instead of on the machine." The object of this provision is to make the use of the McTammany voting machine by the voter permissive instead of compulsory; so that, if he prefers not to use the machine he may write out his vote. It does not, in my opinion, authorize the establishment of voting arrangements whereby the voter may use the machine in the discharge of a portion of his duty of voter, but must resort to a paper ballot for the remainder.

Very truly yours,

Hosea M. Knowlton, *Attorney-General.*

A statute requiring proposals for work or material exceeding a certain sum in value to be advertised for cannot be regarded as requiring a useless and unnecessary formality where no good will result to the Commonwealth thereby, and such a statute does not render it necessary to advertise when there is no possible competition, and but one customer for the contract.

The State House Construction Commissioners are not required to advertise for proposals for furnishing electric lights to the intermediate portion of the state house extension.

Aug. 11, 1896.

His Honor Roger Wolcott, *Lieutenant-Governor, Acting Governor.*

Dear Sir: — I have the honor to acknowledge the receipt of your request for my opinion as to whether the State House Construction Commissioners are required to advertise for proposals for furnishing electric lights to what is called the intermediate portion of the state house extension. St. 1889, c. 394, § 4, provides that all work done by the commissioners shall be "by express contract," and "proposals for work or material exceeding one thousand dollars in value shall be advertised for," etc. I am informed that the proposed work will cost more than one thousand dollars, and that it is therefore within th letter of the statute quoted.

The commissioners have called upon me and stated facts bearing upon the question as follows. What is known as the intermediate portion of the state house addition is that part which connects the state house annex, so called, to the original state house. Work upon this intermediate portion was not begun until the portion of the addition now in use was completed and occupied. The whole structure, including the intermediate portion, strictly speaking, is the state house addition, and as such is included in the provisions of the statute authorizing the work. The whole work was not constructed together, because the governor and council, in 1891, in view of the pressing need of additional accommodations, instructed your board to proceed with and complete the northern part before beginning upon the intermediate work.

When it became necessary to contract for electric lighting for the part now in use, proposals were issued and duly advertised, and a contract was made with the General Electric Company, they being the lowest bidder, for constructing a plant and furnishing electric lights to the annex building. This contract was for a gross sum. At the time it was supposed that the plant contracted for would be sufficient to furnish all the lighting needed for the intermediate portion and the old state house as well, but it has been found to be sufficient only for the part of the addition now

in use. It becomes necessary, therefore, to provide for electric lighting for the intermediate portion.

I am informed that it would be impracticable to contract with any other person or company for an addition to the present plant sufficient to furnish lighting for the intermediate portion and for the old state house. Each electric lighting company has its own machinery and methods of producing light, and the methods of other companies cannot be used conjointly in this plant.

The commissioners, therefore, are driven to one of two alternatives. Either they must establish a new and independent plant for the intermediate portion and for the old state house, thus providing for two engines, boilers, dynamos, and other apparatus, or the addition necessary for the new work must be made by the present company, as an extension of their present contract. The former alternative is not to be considered, by reason of the great additional expense which would be involved by the establishment and maintenance of two electric lighting plants under one roof.

It follows, therefore, that the only practicable course open to the commissioners is to extend the present plant sufficiently to provide for the lighting of the whole building. This being so, to advertise for proposals would be a needless form, there being but one possible bidder. It would also be an injustice to other possible bidders, who might not understand that their bids could not be considered in any event.

I am further informed that the commissioners are able to make a contract with the company now lighting the larger portion of the annex for such an extension of its plant as will be sufficient for all the new work, upon the basis of the present price.

Upon these facts, I am clearly of the opinion that the commissioners are not required to advertise for proposals for lighting the intermediate portion, that being the specific matter to which my attention is called. I do not understand that at present they have any authority for the lighting of the Bulfinch front. While the law is explicit in providing that contracts shall be made after advertisement, I am of opinion that, in view of all the facts, the proposed work may properly be regarded as an extension of work already contracted for in accordance with the provisions of law, and therefore such as need not be advertised for. The law cannot be regarded as requiring a useless and unnecessary formality, where no good will result to the Commonwealth. It cannot be necessary to advertise when there is no possible competition and but one customer for the contract.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

A town having contracted with the Massachusetts highway commission for the construction of a state highway under the provisions of St. 1894, c. 497, § 4, may make contracts with other contractors for the performance of the work or any part thereof for which it has so contracted.

St. 1896, c. 481, § 2, which provides that no persons except citizens of the Commonwealth shall be employed on the work of constructing state highways, applies to employees actually employed on the work of repairing or constructing; and a contractor who is an employer only is not within the prohibition of said section.

No contractor may employ persons in the work of constructing state highways who are not citizens of this Commonwealth.

Aug. 11, 1896.

Mr. A. B. Fletcher, *Clerk Massachusetts Highway Commission.*

Dear Sir: — I have your letter of the 29th, requesting my opinion upon two questions stated therein.

First. — Whether a town having a contract with your commission has the right to sublet its contract or any part thereof to other contractors.

St. 1894, c. 497, § 4, provides that, when the commission is about to construct a highway, it shall give to each city and town in which said highway lies a copy of the plans and specifications; and such city or town shall have the right without advertisement to contract with said commission for the construction of so much of such highway as lies within its limits, in accordance with the plans and specifications and under its supervision and subject to its approval, at a price agreed upon between the commission and the city or town. It was not the purpose of this section to secure the services of town officials in constructing state highways in preference to those of other persons. It cannot be said that town authorities have any such special skill or experience in the construction of highways as makes it advantageous to the Commonwealth to have its roads built by them. The purpose of the statute was rather to favor towns in the performance of the work, to the end that its citizens might have employment on the work, as they would have had if the road had been built by the town instead of by the state. The section is in the interest of the town and its citizens, rather than the Commonwealth.

This being so, it is of little consequence to the Commonwealth whether the town shall perform the work which it contracts to do for the state or shall sublet the whole or any part thereof to others. The work contracted for by the commission must still be done "under its supervision and subject to its approval," by whomsoever has the contract. I see no reason why towns may not, if they see fit to, make contracts for the performance of the

work or any part thereof which they may contract to do for the Commonwealth.

The second question in your letter is as follows: "If a town having a contract with this commission has a right to legally sublet any portion of the work to a contractor living out of the state, and if it would make any difference whether the contractor employs citizens of this Commonwealth, or not."

St. 1896, c. 481, § 2, provides that "No persons except citizens of this Commonwealth shall be employed on the work authorized by this act." The work referred to is the construction of state highways, for which the sum of $600,000, was appropriated. I do not think a contractor is necessarily a person employed in the work. That expression as used in the statute refers to employees actually employed on the work of repairing or constructing. A contractor is usually an employer, not an employee. If the contractor is an employer only, he is not within the prohibition of the section quoted. Whether he is a citizen of the Commonwealth or not, however, he may not employ persons in the work who are not such citizens.

Yours truly,

HOSEA M. KNOWLTON, *Attorney-General.*

St. 1894, c. 491, § 27, as amended by St. 1895, c. 496, § 9, which provides for the payment in certain cases, by the Commonwealth of the expenses of quarantined animals, applies only to such animals as are of the class that yield edible products while living, and not to animals no product of which while living could be sold for food purposes.

AUG. 12, 1896.

Mr. CHARLES P. LYMAN, *Secretary of the Board of Cattle Commissioners.*

DEAR SIR: — Your letter of the 22nd ultimo requires my opinion upon the question whether the Commonwealth is liable for the expenses of quarantined animals so held upon the premises of the owners thereof for more than ten days.

St. 1894, c. 491, § 7, provides that when an inspector upon examination of a domestic animal suspects or has reason to believe that the animal is affected with a contagious disease, and whenever directed to do so by the board of cattle commissioners, he shall immediately cause said animal to be quarantined or isolated upon the premises of the owner. Section 26 of the same chapter provides that the boards of health of cities and towns, in case of the existence of any contagious disease among domestic animals, shall cause the animals which are or which they have good reason to

believe are infected with any contagious disease to be quarantined in some suitable place within the limits of such city or town. Section 45 provides for quarantine, by the board of cattle commismissioners, of all domestic animals affected with contagious disease, whenever satisfied that the public good requires it. Section 27 of the same act, as originally enacted, provided that, when any animals were quarantined upon the premises of the owner, the expense thereof should be paid by such owner or person in possession.

By St. 1895, c. 496, § 9, the section last referred to (27) was amended by adding thereto the provision that "Whenever specific animals are quarantined or isolated under the provisions of sections seven, twenty-six and forty-five of this act more than ten days upon such premises (of the owner), as suspected of being afflicted with a contagious disease, and the owner is forbidden to sell any of the product thereof for food . . . the expense of such quarantine shall be paid by the Commonwealth."

Acting under the above provisions of the statutes, I am informed that your board has issued two forms of orders of quarantine, one for all animals except cows in milk suspected as tuberculous, and the other for cows in milk. In the order for cows in milk, the owner is expressly forbidden to sell or dispose of the milk therefrom in any market. No such prohibition is contained in the other form of order. The question to which my attention is directed by your letter is whether, in the cases where bulls, oxen and dry cows are quarantined without the prohibition above referred to (to wit, against selling the milk), the Commonwealth is liable for the expenses of quarantine after the period of ten days mentioned in the statute. It is claimed by some owners of cattle so quarantined that, although no express prohibition is inserted in the order, they have in fact no right to sell the meat from such cattle, if killed by them, and that consequently they are within the provisions of the amended statute, which provides for the payment of the expenses by the Commonwealth when the owner is "forbidden to sell any of the product thereof for food."

If it be conceded that the owner may not sell the meat products of cattle so quarantined, after being killed, for food purposes, and that the word *product* as used in the amended section includes the flesh and other products of the carcass, then the contention of the owners is correct. It may further be said that, if such is the construction of the law, it was not necessary to limit payment when quarantine extends more than ten days to cases where the owner is forbidden to sell the product for food, for then the owner would be entitled to compensation in all cases of quarantine after the expiration of ten days. If this were the intention of the

legislature, it could have been much more simply and directly expressed.

I do not concede, however, that the law in terms forbids the selling of meat from cattle which have been quarantined as suspected of being affected by contagious disease. Throughout the statute a clear distinction is made between cattle and carcasses, and the provisions as to each are distinct. When cattle are quarantined upon the premises of the owner, they are declared by section 34 to be "deemed to be affected with a contagious disease." This obviously refers to the cattle while living. It is not possible in all cases to determine whether a living animal is affected with disease or not. The law therefore has provided for action by the cattle commissioners without requiring of them definite proof as to the existence of disease, and has further provided that when they are quarantined under suspicion they shall be deemed to be what may be termed constructively affected with contagious disease. While so branded, the cattle themselves cannot be sold, nor can the milk or other food products which they produce while alive.

But, although the owner is forbidden to sell an animal quarantined upon his premises, or any of the food products thereof, he may kill it. After the animal has been slaughtered, the existence of contagious disease can be conclusively determined. If upon examination, as provided in section 21, it appears that the animal was not affected with disease he may sell the meat and other food products which may be obtained from the carcass. If, on the other hand, the examination discloses that the animal was diseased, its owner may not sell the meat of the carcass. But this prohibition does not arise from the fact of quarantine, but from the disease.

It follows, therefore, that, while it is true that the owner may not sell animals quarantined upon his premises or the milk therefrom, for the reason that they are suspected of being affected with contagious disease, and are therefore by the provisions of the act deemed to be so affected, yet, if he exercises his right of ownership in the cattle by killing them, and it turns out that they had not in fact been affected with disease, he is not prohibited from selling the meat and other products of the carcass.

The word product is used in the statute in two connections; one as applied to carcasses, and the other as applied to animals. Section 17 speaks of "the carcass or any of the meat or product of" cattle. Section 22 also forbids the slaughtering of cattle with the intent of "selling the carcass or any of the meat or product thereof for food," without having obtained a license. On the other hand, in section 15 a penalty is imposed upon a person who sells

or has in his possession with intent to sell for food "any diseased animal or any product thereof, or any tainted, diseased, corrupted, decayed or unwholesome carcass." In this section, the word "product" obviously means the product of a living animal. The section under consideration providing for the quarantine of cattle is one relating not to carcasses but to living animals, and the obvious meaning of the word "product" therein is the product of such living animals, to wit, milk, butter, cheese, etc.

I am of opinion, therefore, that it was the intention of the legislature in the section in question to provide for the payment of the expenses of quarantined animals by the Commonwealth only when animals are quarantined which are of the class that yield edible products while living, as, for example, milch cows; and that it was not the intention of the legislature to authorize the payment of such expenses in the case of animals no product of which while living could be sold for food purposes, and as to which consequently there could be no occasion for prohibition against such sale by the commissioners.

In the foregoing opinion I have dealt with the question only so far as it relates to your right under the statutes, as officers charged with the administration thereof. Whether for any reason the owners have an equitable claim upon the Commonwealth independent of the specific provisions of the statute, involves questions which it is unnecessary to consider at this time.

Yours truly,

HOSEA M. KNOWLTON, *Attorney-General.*

It is the duty of the secretary of the Commonwealth to provide McTammany voting machines which are required to be furnished by him under the provisions of St. 1896, c. 498, § 1, containing, so far as presidential electors are concerned, knobs for groups of electors only, and not a separate knob for each candidate for presidential elector.

SEPT. 30, 1896.

Hon. WILLIAM M. OLIN, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion upon the question whether, under St. 1896, c. 498, § 1, it is your duty to provide the McTammany voting machines, which you are required under that statute to furnish to towns and cities, with separate knobs for each candidate for presidential elector; or whether you may provide only knobs enabling the voter to vote for each group of electors.

Upon a careful examination of the capacity of the McTammany machine in its present form, I do not think all the requirements of

law relating to voting can be satisfactorily carried out, whichever course is adopted. I assume it to have been the intention of the legislature to substitute the McTammany machine for the Australian ballot, preserving, however, in so doing, all the essential provisions of law relating to the Australian ballot, so far as they can be made applicable to machine voting. The McTammany machine as now constructed is provided with fifty knobs, each of which on being pressed will register a punch in a roll of paper. By certain devices, not necessary now to mention, these holes may be counted as votes for the persons whose names are connected with the knobs so pressed. There is and can be no provision in such a machine by which it can be used by a voter who wishes to vote for a candidate other than those upon the official ballot. The law has therefore provided (St. 1893, c. 465, § 6) that blank sheets of paper shall be provided for the voters, and that "any voter may vote on one of said blank ballots instead of on the machine."

As preliminary and incidental to the main inquiry, it becomes necessary to consider whether the machines can be used in connection with the blank ballots, so that a voter may perform part of his duty upon the machine, and vote for such other candidates as he desires upon the blank ballots. In my opinion, this is impracticable, for the reason that, as I am informed, there is no way of preventing a voter from voting upon the machine for any given office, and then voting again for the same office upon the blank ballot. Even if the ballot commissioners should, under the authority given them to make rules, provide that no candidate upon the official ballot should be voted for upon the blank ballots, it would still be possible for a voter to vote for an official candidate upon the machine, and then for another independent candidate upon a blank ballot. It is true that this would nullify his vote to a certain extent, but it would still enable him to indicate his preference for two candidates out of those to be voted for, which would be a discrimination against the other candidates, that the spirit of the law seems to forbid. I am of opinion, therefore, that the intention of the legislature was that a voter should elect, before beginning to exercise his right of suffrage, whether he would use the machine, or write his ballot upon the blanks provided. If any part of his voting were done upon the machine, he could not supplement it by voting upon a blank ballot. This is not only the literal meaning of the language above quoted, but is the only way in which double voting can be prevented. A voter cannot vote for the same candidate twice upon the machine. There is nothing in the structure of the machine, however, to

prevent him from voting for different candidates for the same office. I am told, however, that, to a limited extent, — that is to say, where there are less than ten candidates who may be voted for for any given office, — double voting may be detected and the vote thrown out. But in the case of presidential electors, where the voter has the right to cast his ballot for fifteen, there appears to be no way of preventing the voter from voting for more than fifteen, or for all the electors who are on the official ballot.

It has been suggested that knobs might be provided both for voting by groups, and also for each elector, so that a voter could either vote in groups, or make his selection among the various candidates. This is impracticable, however, for the reason that there is no way of preventing a voter from pressing the knob which stands for the group, thus voting for the fifteen electors to which he is entitled, and also pressing the knobs for fifteen electors, thus voting for his electors twice. This plan, therefore, cannot be considered.

If separate knobs are provided for each elector, several difficulties arise. The voter is put to great inconvenience. I am informed that there will be upon the official ballot five groups of candidates for presidential electors, being seventy-five in all. The voter, therefore, is called upon to select his candidates from seventy-five names, for which there are provided seventy-five knobs; and he is thus required, if desiring to vote the straight ticket, to vote fifteen times. But the legislature of 1892 provided (St. 1892, c. 279, § 2) that a "voter who desires to vote for an entire group of candidates for electors shall place a cross mark in the square at the right of the party or political designation immediately above such group, and such cross mark shall count as a vote for all the candidates, in such group." The plain intention of this law is to rid the voter of the annoyance of carrying in mind all the candidates for presidential electors, and to enable him to vote for his candidate for president and vice-president by a single act. Nearly all the voters take advantage of this law. The number of those who desire to separate their votes for presidential electors is almost infinitesimal. Moreover, if separate knobs are provided for each elector, I do not understand that there is any method of preventing a voter from voting for more than fifteen electors, or of detecting the fact in the count of the ballots.

On the other hand, if knobs are provided only for the separate groups of presidential electors, a voter who desires to scatter his vote for electors is driven to the necessity of using the blank ballots for all the votes he desires to cast. As is before stated, I

do not think it is practicable to provide for a partial use of the machine by any voter. Nor does this method fully comply with the provisions of St. 1896, c. 498, requiring you to furnish a sufficient number of McTammany voting machines to enable "all candidates for all offices" to be voted for on such machines. It is not a substantial compliance with this provision to provide a machine which only enables a voter to vote for such candidates by groups, and not individually.

I have suggested the difficulties which will arise, whichever form of machine you adopt. All the provisions of law cannot be carried into effect, and fraudulent and double voting effectually guarded against, by the use of the machine as now constructed, under any method. It is to be borne in mind, however, that the legislature desired the experiment of using the McTammany machines to be fairly and fully tried. The law is to be construed to that end rather than to the abrogation of its provisions. In my opinion, therefore, you will discharge your duty if you adopt such method as will best secure the convenience of the greatest number of voters, and give to the largest number the rights and privileges which belong to them. If you provide knobs only for groups of electors, you best serve the great majority of voters, and put to the inconvenience of writing ballots only the comparatively small number who desire to vote other than by groups. If, on the other hand, you provide a separate knob for each elector, you take away from the vast majority of voters the privilege which belongs to them of voting for electors by groups, and also open the door to the possibility of double voting.

It has been suggested that machines could be constructed which would obviate some if not all of these objections. Here again, we meet with an obstacle in the fact that it would be impossible between now and election time to construct a machine upon a pattern which would overcome the difficulty suggested; and, if McTammany voting machines are to be used at all, those now under consideration must be adopted.

Upon the whole, therefore, in view of all the circumstances and difficulties which I have suggested, I am of the opinion that you will best carry out the intention of the legislature by providing machines containing, so far as presidential electors is concerned, knobs for groups of electors only, leaving to the voter who desires to scatter his vote the privilege of writing it upon the blank ballots.

Very truly yours,

Hosea M. Knowlton, *Attorney-General.*

The state house construction commission is not required by St. 1896, c. 531, § 1, to provide for a sub-basement story in the so-called Bulfinch state house, as suggested in the report of the prior commission made to the legislature April 13, 1895; but the construction of the said sub-basement story is left to the discretion of the commission.

The said commission in reconstructing the Bulfinch state house, may make such use as they deem proper of the boiler room, which is part of the same, although it lies without the walls of the structure.

Oct. 3, 1896.

His Honor Roger Wolcott, *Acting Governor*,
Chairman State House Construction Commission.

Dear Sir: — My opinion has been orally requested upon two matters connected with the duties of your commission.

First. — St. 1896, c. 531, § 1, makes it the duty of your commission to "consider and decide upon a plan for preserving, restoring and rendering practically fireproof the so-called Bulfinch state house, substantially in accordance with the report and specifications of the commission appointed by Governor Greenhalge for the preservation of the Bulfinch state house, made to the legislature on the thirteenth day of April, in the year 1895." In the report of that commission is the following recommendation, being the last paragraph but one of the report, to wit: "In view of the fact that the removal of the mezzanine floors would reduce the available space of the building, it is perhaps not improper to suggest that the underpinning of the foundation walls may readily be carried to a depth sufficient to allow of a sub-basement story, which would afford ample space for storage, and leave some of the upper rooms now used for that purpose available for other uses."

The question proposed by your commission is whether, in view of the statute above quoted, you are required to provide for a sub-basement story, as suggested in the report of the prior commission. I am of the opinion that the construction of a sub-basement story is left to your discretion. The essential features of your work require you to provide a plan which shall (1) preserve, (2) restore and (3) render practically fireproof the old state house. The construction of a sub-basement story is not essential to any of these results. It was suggested by the commission as a convenient way of providing additional storage room; but was obviously not regarded by them, as, indeed, it is not, an essential feature of the reconstruction proposed.

Second. — The commission also desire my opinion upon the question whether they have the right to convert a basement room, now used as a boiler room, into a storage basement. The only doubt in relation to this question arises from the fact that the

boiler room is practically outside and west of the present western wall of the old state house. It is, however, a part of the Bulfinch state house, which you are called upon to reconstruct. If the question were whether you should construct an independent basement outside the walls of the state house, it might be seriously doubted whether such an undertaking would be within the scope of your authority; but I see no reason why, as incidental to the work of restoring and reconstructing the old state house, you may not properly make such use of the boiler room referred to as you deem proper, even though it is without the walls of the structure. It is, nevertheless, a part of the building you are called upon to repair.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

One who has declared his intention of becoming a citizen of the United States, but has not been naturalized, is not a citizen of the United States, and therefore not a citizen of Massachusetts.

OCT. 8, 1896.

A. B. FLETCHER, Esq., *Clerk Massachusetts Highway Commission.*

DEAR SIR: — I understand that the highway commission desires my opinion upon what constitutes a citizen of the state of Massachusetts; particularly with reference to the case of a man who has declared his intention of becoming a citizen, but has not been naturalized.

No man is a citizen of the United States, and, therefore, not a citizen of Massachusetts, until he has been naturalized. What are called the first papers do not amount to naturalization. After a man has been naturalized, if he is a resident in Massachusetts, he at once becomes a citizen of Massachusetts.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

The board of agriculture may not incur the expense of sending an agent to another state for the purpose of investigating the question of the existence of the gypsy moth in that state.

OCT. 9, 1896.

WILLIAM R. SESSIONS, Esq., *Secretary Board of Agriculture.*

DEAR SIR: — I do not think a proper construction of the laws creating your board and defining its duties, and the subsequent acts making appropriations for the work thereof, can be said to

authorize the expense of sending an agent to another state for the purpose of investigating the question of the existence of the gypsy moth in that state.

The duties of your board, briefly stated, are to carry on the work of extermination of the insect, and prevent, so far as possible, its introduction and dispersion throughout the Commonwealth. This does not properly include the making of investigations in other parts of the country. If the legislature had intended to authorize such expenses, the authority would have been conveyed in express terms.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

Under the provisions of St. 1884, c. 320, § 20, the necessary travelling expenses which may be paid to the chief examiner appointed by the civil service commissioners consist only of such travelling expenses as are incurred in performing the work of the commission within the Commonwealth.

OCT. 9, 1896.

WARREN P. DUDLEY, Esq., *Clerk Board Civil Service Commissioners.*

DEAR SIR: — I have been called upon in several instances to consider the statutes of the Commonwealth relating to its commissions and heads of departments, with reference to the question how far they authorize travelling expenses without the Commonwealth. In some instances such expenses are expressly provided for. But where the duties of such commissions are to be performed within the Commonwealth, and do not in terms require visits to other parts of the country, I am unable to say that such travelling expenses are properly within the scope of the statutes, The expression "necessary travelling expenses," specified in St. 1884, c. 320, § 20, means, in my judgment, expenses incurred in performing the work of the commission within the Commonwealth. Whenever the legislature has intended that its officers and servants should travel beyond the limits of the state, it has given such authority in express terms.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

The settlement laws of each state relate to the citizens of such states and to the relative obligation of the municipalities on the one hand and of the state upon the other hand as to such citizens.

Such laws have no extra-territorial effect, are not binding upon any other of the states of the Union, and cannot be enforced by said states.

Between different states there can be no such thing as a place of legal settlement within the contemplation of the pauper laws.

A person having removed from another state to Massachusetts, with the intention of residing here, and having taken up his residence here, becomes a citizen of Massachusetts and ceases to be a citizen of the state from which he removed. Such a person becomes bound by the provisions of the settlement laws of Massachusetts, and ceases to have any settlement in the state from which he removed.

The father of an infant pauper removed from Lubec, Me., to Boston, Mass., in June, 1895, with the intention of becoming a citizen of Massachuchusetts, bringing the said pauper with him, and was at the date of this opinion residing in said Boston. He had before removal therefrom a legal settlement in Lubec.

A state officer of Massachusetts who should take the said pauper to Lubec for the purpose of having her supported by said town would violate the provisions of the Statutes of Maine, 1891, c. 1, p. 8, providing a penalty for bringing into a town of Maine where he has no settlement a poor, indigent or insane person, with intent to charge such town with his support.

Oct. 12, 1896.

Stephen C. Wrightington, Esq., *Superintendent.*

Dear Sir: — Your letter states that the father of the pauper in question removed from Lubec, Me., to Boston, Mass., June 2, 1895, and is now residing at Maverick Square, East Boston. I assume, although it is not stated in the letter, that this removal was made with the intention on his part of becoming a citizen of Massachusetts.

A person being a citizen of the United States, and of any of the states of the Union, has the right to remove from one state to another, and to become a citizen of the state to which the removal is made. No length of time is necessary to acquire such citizenship in the state to which the removal is made. As soon as the party in question arrived in Massachusetts, having formed the intention to reside here, and took up his residence here, he became a citizen of Massachusetts, amenable to its laws and entitled to their protection.

The settlement laws of Massachusetts, as well as those of other states of the Union, comprise a body of rules adapted to determine the respective rights of the Commonwealth and its municipalities, and the rights of such cities and towns as to each other. The Commonwealth, is bound to support and maintain such of its

citizens as fall into distress. This burden must be discharged by the Commonwealth, unless the person so receiving aid has in some way provided by law acquired a settlement in one of the towns of the Commonwealth. The rules of settlement are arbitrary. They are not based upon contract, but may be changed from time to time, at the pleasure of the legislature. The purpose of them, however, is to insure relief to every citizen of the Commonwealth, either by the Commonwealth or by the town or city in which the pauper has acquired a settlement. These rules have no extra-territorial effect. They are not binding upon any other of the states of the Union, and cannot be enforced by said states. On the other hand, the settlement laws of such other states have no binding force in Massachusetts. The settlement laws of each state relate to the citizens of such states, and to the relative obligation of the municipalities, on the one hand, and of the state, upon the other hand, as to such citizens. But between different states there can be no such thing as a place of legal settlement, within the contemplation of the pauper laws. A person having removed from another state to Massachusetts becomes a citizen of Massachusetts, and ceases to be a citizen of the state from which he removed. He becomes bound by the provisions of the settlement laws of Massachusetts, and ceases to have any settlement in the state from which he removed.

Your letter states that the person in question had before removal therefrom a legal settlement in Lubec, Me. That, however, was a settlement which affected his rights so long as he remained a citizen of Maine, and determined the relative duty of the state of Maine, and of the other towns in Maine, on the one hand, and the town of Lubec on the other, as to his support, and the support of those dependent upon him. Such a settlement, however, is not a settlement within the contemplation of the Massachusetts pauper laws. It cannot be enforced as to a citizen of Massachusetts at the instance of this Commonwealth.

It is true the statutes of Maine provide that "whenever a person having a proper settlement in any town in this state [Maine] shall hereafter live for five consecutive years without the limit of this state, without receiving pauper supplies from any source within this state, he and those who derive their settlement from him lose their settlement in such town." This, however, does not give any rights to the Commonwealth of Massachusetts. It is simply a provision which relieves the town of Lubec as against the state of Maine from the force of a settlement acquired in that town, and which has been discontinued by a residence of five years elsewhere. It does not purport to, and could not, continue to give

rights of settlement in Lubec to a citizen of Massachusetts, who before becoming such a citizen had been settled in Lubec.

The principles above stated are well set forth in the case of Dover *v.* Wheeler (Vermont), 7 Rowell, 160. It has been suggested, however, that the Vermont statute, upon which Dover *v.* Wheeler is decided, prohibits the bringing of paupers into the State of Vermont, even when settled there; while the Maine statute only prohibits the bringing in of non-settled paupers. This, however, is not an essential distinction, for, as I have already stated, when the man in question removed from Lubec to Massachusetts, and became a citizen of Massachusetts, he ceased to have a settlement in Lubec so far as the Commonwealth of Massachusetts is concerned. The only settlement he could then have had in Lubec was one which would be binding upon that town in case he fell into distress in any other town in the state of Maine. It was not a settlement which compelled the town to receive and support him as a citizen of another state.

I am of opinion, therefore, that a state officer of Massachusetts who should take the pauper in question to Lubec, for the purpose of having her supported by the town of Lubec, would violate the provisions of the statutes of Maine (St. 1891, c. 1, p. 8), which provides that "whoever brings into and leaves in a town where he has no settlement, any poor, indigent or insane person having no visible means of support, or hires or procures such person to be so brought, or aids or abets in so doing, knowing such person to be poor, indigent or insane, as aforesaid, with intent to charge such town in this state with the support of such person, shall be fined not exceeding three hundred dollars or imprisoned not exceeding one year."

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

An affidavit accompanying an application to the governor for the surrender of an alleged fugitive from justice contained a statement that the person sought was "a fugitive from justice." Such a statement is a conclusion of law and not a statement of fact, and does not comply with the requirements of Pub. Sts., c. 218, § 1, providing that such an application shall be accompanied by sworn evidence that the person sought to be extradited is a fugitive from justice.

OCT. 24, 1896.

His Honor ROGER WOLCOTT, *Lieutenant-Governor, Acting Governor.*

DEAR SIR: — I have the honor to acknowledge your request for my opinion upon the sufficiency of the requisition papers accom-

panying the application for the surrender of E. E. Wilson, an alleged fugitive from the justice of the state of Missouri.

Pub. Sts. c. 218, § 1, provides as follows: "The governor of this state, in any case authorized by the Constitution and laws of the United States, may on demand, deliver over to the executive of any other state or territory any person charged therein with treason, felony or other crime . . . *provided*, that such demand or application is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or of a complaint made before a court or magistrate authorized to receive the same."

This statute is not in controvention either of the Constitution of the United States or the Revised Statutes of the United States, section 5295, in so far as it makes provision for the evidence to be submitted to the governor upon whom the application for extradition is made, that the person charged is, in the words of the Constitution, "a fugitive from justice." Both the Constitution and the United States Statutes are silent concerning what proof is required. It is necessary, therefore, that applications for extradition made upon your Excellency shall be accompanied by sworn evidence that the party charged is a fugitive from justice.

The expression "a fugitive from justice" means that a person having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for this offence has left its jurisdiction and is found within the territory of another. (Roberts *v.* Reilly, 116 U. S. 80, 97.) The affidavits accompanying the application must, therefore establish (first) that the person charged was within the state when the crime was committed; and (second) that since the commission of the crime he has left its jurisdiction, and is found within the state upon which the extradition is made.

The only affidavit that refers to this fact accompanying the application is that of one Stanton B. Wilcock, who swears that the facts stated in the petition of the district attorney are true. The petition of the district attorney states that the "said E. E. Wilson is a fugitive from justice from said state of Missouri, and your petitioner has reason to believe, and does believe, that the said E. E. Wilson is now in the city of Boston in the state of Massachusetts, a fugitive from justice." Assuming that this is sufficient evidence that the person sought to be extradited is now within the Commonwealth of Massachusetts, there is yet no allegation that he was ever in Missouri. The statement in the affidavit that he is a fugitive from justice is a conclusion of law and not a statement of fact, and cannot be received by your

Excellency as an affidavit of fact. (Jones *v.* Leonard, 50 Iowa, 106.) The only suggestion that Wilson was ever in Missouri is contained in the fact that the indictment charges him with having committed a crime in Missouri on the date named therein. But the indictment, while to be taken as conclusive evidence that the person is charged with crime, is not "sworn evidence" of any other fact, not even of the fact that he was in the place where the crime was committed at the time of its commission.

I am constrained, therefore, to advise your Excellency that the requirements of our statute, which provides that there shall be submitted sworn evidence that the person sought to be extradited is a fugitive from justice, to wit, that he was in the state making the application when the crime was committed, and has left its jurisdiction and is now in Massachusetts, are not complied with, and that you have no authority to surrender the said E. E. Wilson as a fugitive from justice.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

The name of a candidate for governor who was nominated as such by three political parties appeared three times upon the official ballot. The vote of any person placing a mark on the ballot against his name each time it appeared should be counted as one vote for said candidate, but such vote cannot be counted for any political party.

OCT. 28, 1896.

Hon. WILLIAM M. OLIN, *Secretary of State.*

DEAR SIR: — St. 1893, c. 417, § 75, provides in substance that any political party which at the preceding annual election polled for governor at least three per centum of the entire vote is entitled to have its nominees placed upon the official ballot. In order to carry out the provisions of this section it is necessary, if two or more parties nominate the same candidate for governor, to print his name upon the official ballot as many times as he has been nominated by different parties, adding in each case the political designation of the party so making the nomination; and in making return of the votes cast to include not only the total number of votes cast for the candidate, but the number cast by each party of which he is the nominee.

Your letter states that George Fred Williams of Dedham has been nominated by three political parties as candidate for governor, and that consequently his name will appear three times upon the official ballot. Your letter, in view of the fact that there may be voters who inadvertently, and contrary to the instructions of the

ballot, willl place a mark against his name, each time it appears, requests my opinion as to whether such votes should be counted and how.

I am of the opinion that such votes should be counted for Mr. Williams as one vote, but that they must be returned as without political designation.

The provisions of the statutes are designed to give every voter the opportunity of voting in secret, and to have his vote counted if he has made his intention clear. Where through his own fault he has left it doubtful for whom he intended to vote, his ballot cannot be counted. But a voter who marks the name of the candidate three times does not thereby obscure his intention. On the contrary, he makes it more emphatic. No possible room for doubt is left as to whom he intended to vote for. It would be a technical and unreasonable construction of the provisions of the ballot law that would forbid the counting of his vote when he had not only expressed his intention plainly, but reiterated it.

A voter, however, who so duplicates his markings, obscures his intention as to parties. His vote can be counted but once to make the necessary three per centum of any party, and, as he has marked for more than one party, it cannot be counted for any party. His vote must be returned as one vote for governor, without party designation.

Very truly yours,

HOSEA M. KNOWLTON, *Attorney-General.*

Two political parties nominated the same candidates for president and vice-president, whose names headed two groups of presidential electors upon the official ballot. Some of the electors in each group were identical, but not all.

A voter who makes a cross in both blank spaces designated by the names of the said candidates is not entitled to have his vote counted as one vote for such electors as are indentical in the two groups, but his entire vote for electors must be rejected.

OCT. 31, 1896.

Hon. WILLIAM M. OLIN, *Secretary of State.*

DEAR SIR: — My opinion is requested upon the following question, viz.: in accordance with the provisions of St. 1893, c. 417, § 163, the names of the presidential electors are grouped upon the official ballot by parties, and each group is headed by the names of the candidates for president and vice-president, for whom such groups of electors are expected to vote. A blank space is left at the right of the names of the candidates for president and vice-president; and if a voter places a cross in such space, he votes

for the group of electors representing the party whose candidates for president and vice-president stand opposite his cross. Two groups of electors appear upon the official ballot, both of whom are nominated by political parties whose candidates for president and vice-president are respectively Bryan and Sewall. Consequently there are two spaces on the official ballot where a voter may mark for Bryan and Sewall, each representing a group of electors. Some of the electors in each group are identical, but not all. Your question is, in case a voter inadvertently marks a cross in both places designated by the names of Bryan and Sewall, whether his vote for such electors as are identical in the two groups can be counted as one vote for such electors.

The statute above quoted provides that in case one cross is made for a group of electors as above provided, such cross shall count as a vote for each candidate in the group. A voter, therefore, who marks in both spaces, thereby votes for thirty electors, less such number of electors as are identical in both groups. There are three names which appear in each group. Even counting such a vote for two groups of electors as one vote for such names as are identical, the voter has still voted for twenty-seven electors. He is entitled to vote for but fifteen. Following the rule of construction which has uniformly prevailed as to the Australian ballot, which is, that a person voting for more candidates than he has a right to thereby destroys his vote, one who has voted for twenty-seven electors when he is entitled to vote for but fifteen has not expressed his intention with sufficient clearness to entitle him to have his vote counted.

The present case differs from that considered in my letter of the 28th, where two or more crosses were placed against the name of the candidate for governor. In that case the voter, notwithstanding the fact that he had made more crosses than he was entitled to, voted in fact but for one man, and, for the reason stated, his vote must be counted. In the present case, however, he has expressed his preference for twelve more electors than he is entitled to vote for. His entire vote for electors must, therefore, be rejected.

Yours very truly,

Hosea M. Knowlton, *Attorney-General.*

County treasurers may not legally pay any bills in excess of the amounts specifically authorized by law except in the cases specified in St. 1896, c. 357, § 2.

Nov. 6, 1896.

CHARLES R. PRESCOTT, Esq., *Controller.*

DEAR SIR: — Your letter of November 2 proposes the following questions for my opinion thereon: —

First. — Can the county treasurer pay any bills for salaries or expenses in excess of the amounts specifically authorized for the same; and can the county commissioners transfer from unexpended appropriations, or from unappropriated money, to appropriations which have been exceeded, such sums as may be necessary to balance the same, otherwise than for such purposes as are enumerated in section 2 of chapter 357 of the Acts of 1896?

Second. — Is section 26 of chapter 23 of the Public Statutes still in force?

Third. — If said section 26 is still in force, can the county commissioners under it make provision so as to enable the treasurer to pay any bills in excess of the amounts authorized by chapter 59 of the Resolves of 1896?

The purpose of St. 1896, c. 357, is plainly expressed. It requires annual authorization for the expenditure of money by the several counties, and a specification of detail of the purposes for which such expenditure is to be made. It further provides that "no expenditure for any purpose shall be made in excess of the amount so specified; and no bill in excess of such amount shall be paid by the county treasurer," except as provided in the act.

The exceptions are contained in section 2. They relate to appropriations (1) for interest or debt due from the county, (2) for costs in criminal prosecutions, (3) expenses of the courts, and (4) the compensation or salaries of county officers established by law. For various and obvious reasons the law excepts these classes of expenditures from the general provisions above stated, and provides that county commissioners may make payment for such purposes out of any money in the county treasury. As to some of them, to wit, the county debt, and the salaries of officers fixed by law, the intention of the legislature manifestly was that no limitation of appropriation should be allowed to prevent their prompt payment, for the reason that the indebtedness is fixed and absolute. As to others, to wit, costs in criminal prosecutions, and the expenses of the courts, in view of the fact that the amount of such expenses might be increased beyond the estimates of the legislature without fault of the county commissioners, it was ob-

viously deemed by the legislature proper that such increase of expenses should be provided for.

But no exception is made for salaries or expenses that are not fixed and established by law. These being within the control of the county commissioners, it was the intent of the law that as to them they should keep within their appropriation. The reasons for the passage of the law look to the prevention of precisely this class of unauthorized increased expenditures.

I am clearly of the opinion that county treasurers may not pay any bill in excess of the amount authorized, excepting in the cases specified, as above stated, in section 2 of the act.

In view of my opinion as above expressed, it is unnecessary to consider whether or how far Pub. Sts., c. 23, § 26, is repealed. Whether or not it is in all respects repealed by implication, it certainly does not operate to give county commissioners power to borrow money to meet expenses in excess of the amounts which they are authorized by law to incur.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

While a state highway is in process of construction, the Massachusetts highway commission, under St. 1896, c. 541, has exclusive jurisdiction to determine what changes shall be made in the location and construction of a street railway located on such a highway. But when the highway is constructed, the jurisdiction as to such changes conferred upon the town and municipal authorities by Pub. Sts., c. 113, revives.

The Massachusetts highway commission may order the tracks of a street railway to be moved, and pay for such removal out of the amount appropriated for the construction of state highways.

It seems that before ordering a change in the tracks of a street railway company, the Massachusetts highway commission should give notice of the hearing, as provided in Pub. Sts , c. 113, § 21.

Nov. 18, 1896.

A. B. FLETCHER, Esq., *Clerk Massachusetts Highway Commission.*

DEAR SIR: — In your letter of August 21st, the highway commission proposes several questions touching the jurisdiction of the commission and of cities and towns over street railways located upon state highways.

The first question is as follows: "Do the selectmen of a town lose their powers to direct a railway company to move its tracks or make any other changes, under Pub. Sts., c. 113, § 22, on the passage of St. 1896, c. 541?"

In order to arrive at an understanding of the relative rights of the commission, on the one hand, and of the officers of cities and

towns on the other hand, over railroads upon state highways, it is necessary to consider what powers were conferred upon municipal authorities by the provisions of the existing laws before the enactment of the statutes relating to state highways. These provisions are found in Pub. Sts., c. 113, §§ 7, 21 and 22. Under these sections the right of adjudication as to the necessity and public convenience of permitting street railways to encumber highways is given in cities to the mayor and aldermen, and in towns to the selectmen. These boards act not as agents of the city but as public officers and their determination is final upon questions of public convenience and necessity. Under section 7 it is for them as such officers to determine whether a location shall be granted in a public way to a street railway corporation. They must give a hearing to parties interested after due notice and they may refuse the location or grant it under such restrictions as they deem the necessity of the public require. Under section 21, the same tribunals may authorize an extension of the tracks of existing railway companies upon such conditions as they may deem proper, first giving notice as provided in section 7. They are further authorized under the provisions of section 22 to alter the location and position of such tracks "by the same authority and in the same manner as is provided in the preceding section (21) for the location of an extension." In all these cases the municipal boards are the tribunals to whom is committed the question of public convenience and necessity. Their decision is final, and cannot be directed nor abrogated by the action of the city or town itself.

I do not think that the jurisdiction so conferred upon the boards of aldermen in cities and upon the selectmen was intended to be taken away by the statutes authorizing the construction of state highways. It may be that under the provisions of St. 1893, c. 476, § 14, the consent of the commission must be also obtained, in addition to the authority given by the municipal boards, before a state highway can be dug up for the construction of a street railway. This is confirmed by St. 1894, c. 497, § 2, which provides that "all openings and placing of structures in any such road (state highways) shall be done in accordance with a permit from said commission."

The work of constructing a state highway, however, is conferred by the statutes upon the highway commission, and they alone have jurisdiction over such work. Having determined that public necessity and convenience so require, and having thereupon decided that the Commonwealth should lay out and take charge of a given road as a state highway, the commission (St. 1894, c. 497, § 2) shall proceed to construct the way. They may contract with the

city or town therefor, or, if the town does not desire to do the work, they may contract with other parties for its construction. The entire responsibility of this work is vested in the commission. The statute referred to in your question (St. 1896, c. 541) is intended to confirm this authority, so far as relates to street railways. It provides that "whenever in the construction of a state highway it becomes necessary in the opinion of the Massachusetts highway commission to change the location, relay, or change the grade of that part of any street railway located on said highway, or to place different material between its tracks, or to make any other change in the location and construction of said railway," the commission may thereupon proceed to make such change in the manner provided as above stated by Pub. Sts., c. 113, § 22, for boards of aldermen and selectmen. While the highway is in process of construction it is under the sole and exclusive jurisdiction of the highway commission, and it would be very inconvenient to confer the right of making any such necessary changes in the location, etc., of street railways, as the work of construction might require, upon another tribunal. St. 1896, c. 541, therefore, gives jurisdiction during such construction to the highway commission, and while the work is going on they alone have the right to determine what changes are to be made. This prevents a divided or double responsibility. But when the highway is constructed, the jurisdiction of the municipal board revives, and is to be exercised in the interest of public convenience and necessity, as provided by Pub. Sts., c. 113.

The second question of your commission is as follows: "Can the highway commission, under chapter 541 of the Acts of 1896, without an appropriation for the purpose, order the tracks of a street railway to be moved, and pay for it out of the amount appropriated for the construction of state highways?"

The alterations in the location and construction of a street railway provided for by St. 1896, c. 541, are such as are deemed necessary in the course of the construction of a state highway under St. 1893, c. 476, and St. 1894, c. 497. The making of such alterations is as much a part of such construction and included therein as the filling or grading of a highway. The phrase "construction of a state highway," used in St. 1896, c. 541, is equivalent to the phrase "construction of a state highway under the provisions of St. 1893, c. 476, and St. 1894, c. 497." There is nothing in St. 1896, c. 541, showing that the legislature intended that the cost of making the necessary alterations provided for by said statute should be paid for in any other way than out of the appropriation for the construction of state highways. I am of

opinion, therefore, that the commission may order the tracks of a street railway to be moved, and pay for such removal out of the amount appropriated for the construction of state highways.

The third question proposed by the commission is as follows: "If the previous question is answered affirmatively, what are the steps necessary for the commission to take in order to assure itself of the actual cost of the construction of the road, and in order to bring the matter into the proper channels for securing the future repayment of the money to the state?"

The commission is concerned with the question asked only when it is necessary by the provisions of St. 1896, c. 541, that the cost of making the changes provided for therein shall be paid by the commission. It is not concerned where the company itself pays the expense of the changes at the time of making the same. If the changes are made by the railway, and the cost is to be paid by the commission, as provided by St. 1896, c. 541, the method of payment is similar to that employed where the commission itself makes the changes. The actual cost of such changes is to be ascertained by the commission. To enable itself to do this, the commission may avail itself of the provisions of St. 1893, c. 476, § 1, which provides that the commission "may establish rules and regulations for the conduct of business and for carrying out the provisions of this act." Under this section the commission is undoubtedly entitled to require any evidence which is reasonable and necessary to enable it to assure itself of the actual cost. Furthermore, under the provisions of Pub. Sts. c. 16, § 65, the head of the commission may require affidavits from claimants in proof of the validity of any claims presented by them, and the commission may undoubtedly require similar proofs and statements from the railway company. In either event, whether the changes are made by the commission or by the company, if the cost is to be paid by the commission it is clearly intended by the statute that the usual bills and statements of work done and materials furnished in making such changes, properly approved and sworn to if necessary, shall be presented to the auditor of the Commonwealth, whose duty it is to ascertain the actual cost of such changes and certify the same to the tax commissioner.

The fourth question proposed by the commission is as follows: "Is the commission required under the law to give a hearing as provided in section 22, chapter 113 of the Public Statutes, before giving the order to change the tracks?"

St. 1896, c. 541, provides that, when the commission proposes to change the location of a street railway, it must proceed in the manner provided by Pub. Sts., c. 113, § 22, for making such

changes by boards of aldermen and selectmen. The section referred to itself authorizes the municipal board to proceed "in the same manner as is provided in the preceding section for the location of an extension." On reference to the preceding section, it appears that before acting "at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the board of aldermen or selectmen may determine, or otherwise." If the provision of St. 1896, c. 541, above quoted, requiring the commission to proceed in the manner provided in section 22, does not require notice, it is difficult to say what the provision means. I doubt whether the framers of the statute had anything more in mind than a general reference to the authority conferred by section 22 upon municipal boards, and whether it was intended to require notice as was provided in that section; but the words of the statute seem to require your board to proceed in the manner required in section 22, and I am of opinion that the safer course is to give notice as provided in that section.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

Under the provisions of St. 1894, c. 497, § 4, the Massachusetts highway commission is authorized to make contracts only for the entire construction of state highways or portions thereof, and it is not authorized to make separate contracts with different persons for a portion of the work of such construction.

Nov. 28, 1896.

A. B. FLETCHER, Esq., *Clerk Massachusetts Highway Commission.*

DEAR SIR: — My opinion is requested by the commission upon the following question: "Can this commission, under St. 1894, c. 497, § 4, enter into contracts with outside parties or individuals for separate items that enter into the construction of a state highway, or are we required under the law to advertise and accept bids only for the complete construction of a state highway?"

The statute referred to in the foregoing question, after providing that a city or town may without advertisement contract for the construction of so much of a highway as lies within its limits, further provides that, if the city or town shall not so elect, the commission shall advertise "for bids for the construction of said highway under their supervision, and subject to their approval, in accordance with plans and specifications to be furnished by said commission." The section further provides that said proposals shall be open to public inspection after the proposals have

been accepted or rejected. The commission may reject any or all of such bids; or, if a bid is satisfactory, they shall "with the approval of the governor and council, make a contract in writing on behalf of the Commonwealth for said construction, and shall require of the contractor a bond for at least twenty-five per cent. of the contract price, to indemnify any city or town in which such highway lies against damage while such road is being constructed."

These provisions seem to look to one contract for the entire work. There is no reference to contracts for a part of the work in the statute, and no such authority is conferred upon the commission, at least in express terms. Furthermore, the condition of the bond to be given by the contractor would seem to negative any right to contract for partial construction. The contractor, as above stated, must give bond to indemnify the city or town in which the highway lies against damage while the road is being constructed. If contracts were given to one person for materials, to another person for teaming and to still another person for the actual work of building the road, it might be difficult to determine which contractor, if any, would be liable, in case the city or town were called upon to pay damages for an injury growing out of the construction of the way.

For the reasons above stated, I am of opinion that the intention of the legislature was to authorize the commission to make contracts only for the entire construction of state highways, or of portions of state highways, and not to authorize them to make separate contracts with different persons for a portion of the work of such construction.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

The county commissioners of Norfolk county employed an attorney-at-law to appear for them before the joint legislative committee on counties at its hearing relative to the estimates of the commissioners as to the amount of county taxes to be levied for the year 1896; to prepare the statement of the commissioners as to the items in said estimates; and also to appear for the commissioners before the legislative committee on metropolitan affairs.

The county commissioners were authorized to employ an attorney-at-law at the expense of the county for the purposes above specified.

The controller of county accounts has no authority to revise the bill of an attorney-at-law rendered to the county for services performed as above specified.

Dec. 12, 1896.

Charles R. Prescott, Esq., *Controller of County Accounts.*

Dear Sir: — Your letter of the 25th ultimo states that the treasurer of Norfolk county has paid by order of the county commissioners the bill of an attorney-at-law for attendance before the committee on county estimates, with items for three days at Dedham and for arranging and preparing statement, and another item for attendance before the metropolitan committee. You further state that the attorney-at-law was employed by the county commissioners to appear for them before the joint committee on counties "at its hearing relative to the annual estimates of said commissioners as to the amount of county taxes to be levied for the year 1896;" and that this bill is "for his services there, and in preparing the statement of the commissioners as to the items of the amount of their estimates," excepting the last item, which was for appearance for the commissioners before the committee on metropolitan affairs.

Your letter proposes the following questions: —

1. "Were the county commissioners authorized to employ said attorney at the expense of the county for the purposes so specified?"

2. "Has the controller of county accounts any obligation or authority to consider or decide as to whether the bill is a reasonable or proper one as to its charges or amount for the services rendered?"

The duties of county commissioners, as far as such duties concern the question now submitted, are prescribed by Pub. Sts., c. 22, § 20, cls. 2 and 4.

Under these statutes they are to represent the county in all cases which are not specially provided for, and to do such other acts as may be necessary to carry into effect the powers given the commissioners by law. They are in brief to execute the powers conferred upon the corporate body and more especially

among other things, to attend to the laying out of streets, assessment of betterments, erection of certain buildings, making contracts, conveying property, and the management of law suits which the county may bring or in which it may be a defendant.

It is apparent that, while some of these acts may be done personally by the commissioners, in others they must employ assistance. When a conveyance of land is to be made by or to the county, the commissioners cannot be expected to make a personal examination of the title, or where a suit is brought, they cannot be expected to conduct it personally. Whenever professional services are required, it is the right and duty of the commissioners to secure professional assistance.

This being so, the question is whether in the case stated professional assistance was required. It is not unusual for parties appearing before legislative committees to be represented by counsel. It may well be that, in the hearings for which the charges in the bill under consideration were rendered, the county commissioners in presenting their claims needed professional services. In the absence of any statute restricting or controlling their discretion, I am of opinion that, if the commissioners thought that the interests of the county which they were charged to represent would be promoted by the employment of counsel to assist them in presenting the claims of the county, they had the right so to do.

Replying, therefore, to your first question, I am of opinion that they were authorized to employ an attorney-at-law for the purposes specified.

2. There is no law conferring upon the controller any authority to revise the bill under consideration.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

The board of commissioners of savings banks has no authority to extend the time within which a co-operative bank must sell real estate acquired by it.

DEC. 12, 1896.

Hon. STARKES WHITON, *Chairman Board of Commissioners of Savings Banks.*

DEAR SIR: — Your letter of December 9th requests my opinion upon the question whether your board has authority to extend the time within which a co-operative bank must sell real estate acquired by it.

Pub. Sts., c. 117, § 19, provides that a co-operative bank may

purchase real estate upon which it has a mortgage. It further provides that "all real estate so acquired shall be sold within five years from the acquisition of title thereto."

St. 1894, c. 317, § 21, cl. 9, contains a similar provision with relation to property mortgaged to savings banks, with the addition of this proviso, "provided, however, that the board of commissioners of savings banks may, upon the petition of the board of investment of any such corporation and for good cause shown, grant an additional time for the sale of the same."

Pub. Sts., c. 117, relating to co-operative banks, provides in section 20 that "the commissioners of savings banks shall perform in reference to every such corporation the same duties, and shall have the same powers, as are required of or given to them in reference to savings banks." It is the provision last quoted, under which, if at all, any authority of your board can be found to extend the time within which co-operative banks must sell mortgaged real estate which they have acquired.

The history of the legislation upon this subject shows that it was not intended to confer any such authority upon your board as to co-operative banks. At the time of the enactment of the Public Statutes no additional time could be granted, even to savings banks, for the sale of mortgaged real estate acquired by them. The provisions limiting the time for holding such real estate were substantially the same both as to savings banks and as to co-operative banks; and without any provision for extension of time in either case. But by St. 1882, c. 200, § 1, the time within which savings banks might sell such property was extended to the first day of July in the year 1883. By St. 1883, c. 52, a further extension was made to the first day of July, 1884, with a proviso, which appears for the first time in the history of the legislation, that the commissioners of savings banks may grant additional time, not exceeding two years, for the sale of such real estate. St. 1886, c. 77, further extended the time of sale to the first day of July, 1888, and re-enacted the proviso contained in the statute last quoted. St. 1894, c. 317, § 21, cl. 9, which is a substantial codification of existing laws relating to savings banks, re-enacted the proviso giving your board power to grant additional time. It clearly appears, therefore, that the authority given to your board by the proviso in question was intended by the legislature to be limited to sales by savings banks.

I am of opinion, therefore, that your board has no authority to extend the time of sale for co-operative banks.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

Certain lands lying in the towns of Boylston and West Boylston, purchased by the metropolitan water board, are not liable to taxation.

Boston, Dec. 16, 1896.

Hon. H. H. Sprague, *Chairman of the Metropolitan Water Board.*

Dear Sir: — Replying to your favor of the 9th, inquiring as to whether certain lands purchased by your board in West Boylston and Boylston are liable to taxation, I am of opinion that the question should be answered in the negative.

If these lands are subject to taxation, it must be by virtue of some positive and express legislative enactment. They are not liable under Pub. Sts. c. 11, because, by section 5 cl. 2, the property of the Commonwealth is expressly exempted, with certain exceptions, which are not applicable to this case. The land is not liable to taxation under St. 1893, c. 352, § 1, which relates to property taken by purchase or otherwise by any city or town and situate in another city or town, and provides for certain payments from one to the other. The last-mentioned statute does not seem to be incorporated by reference by section 30 of the metropolitan water act (St. 1895, c. 488), providing that "all general laws relating to the water supplies of cities and towns or the lands and other property used for such supplies shall, so far as they are not inconsistent with the provisions of this act, apply to and be observed in carrying out the purposes of this act." Furthermore, section 16 of the same statute contains a provision for the payment by the Commonwealth of certain sums to these towns (Boylston and West Boylston) at times therein specified, and concludes as follows: "and shall pay no tax or other payment to either of said towns on account of any property held by said water board for the purposes of a water supply."

I have found no other statutes than those above mentioned under which it might be claimed that a tax should be levied. If there is any statute relating to the matter which has escaped my attention, I shall esteem it a favor if you will call my attention to it.

Yours truly,

Hosea M. Knowlton, *Attorney-General.*

The agents of the topographical survey commission are authorized to enter upon private lands in the discharge of their duties, if the entry is reasonably necessary, is but temporary in its nature, and is accompanied by no unnecessary damage.

Dec. 19, 1896.

Gen. Henry L. Whiting, *Chairman Topographical Survey Commission.*

Dear Sir: — I have the honor to acknowledge the receipt of your letter of December 7th, requesting, among other things, my opinion upon the following question: "Under the act under which this commission is now acting, have we authority to enter private grounds in making the survey?"

The first authority given to your board was under Res. 1884, c. 72, under which provision was made for a commission "to confer with the director or representative of the United States geological survey, and to accept its co-operation with this Commonwealth in the preparation and completion of a contour topographical survey and map of this Commonwealth hereby authorized to be made." By Res. 1885, c. 29, an appropriation was made for "the determination by triangulation of the boundary lines of the cities and towns in the Commonwealth," the work to be done under the direction of the commission. Additional appropriations have been made from time to time for the same purpose. By St. 1888, c. 336, the commission was authorized to propose changes in the boundary lines of contiguous towns, to locate and define the changes made, and to determine what monuments shall be placed for such lines.

The performance of the duties imposed by these statutes obviously makes it necessary for the commissioners from time to time to enter upon private lands. No such authority is given in terms in any of the statutes, but when an act of the legislature imposes duties upon a public officer, it confers upon him by implication whatever authority is necessary to the performance of such duties.

The commission and its agents are public servants, authorized by statute to make a survey and map of the Commonwealth and to establish boundary lines between the towns. In the discharge of their duties as such it may become necessary to enter temporarily upon private lands. If the entry is reasonably necessary, is but temporary in its nature, and is accompanied by no unnecessary damage, such an entry does not constitute a trespass, but is within the authority of the commissioners. Winslow *v.* Gifford *et al.*, 6

Cush. 327. [See also Cavanagh *et al. v.* Boston, 139 Mass. 426, at p. 435; Brigham *et al. v.* Edmands, 7 Gray 359, at p. 363.]

The foregoing opinion renders it unnecessary to consider the other questions in your letter.

Yours very truly,

HOSEA M. KNOWLTON, *Attorney-General.*

OPINIONS UPON APPLICATIONS FOR LEAVE TO FILE INFORMATIONS IN THE NAME OF THE ATTORNEY-GENERAL.

ATTORNEY-GENERAL *ex rel.* JOSEPH LUNDY *v.* WEST END STREET RAILWAY COMPANY.

MARCH 6, 1896.

This was a petition alleging that the West End Street Railway Company has failed to comply with the orders of the board of railroad commissioners with respect to the use of fenders upon its cars, and requesting the attorney-general to proceed by an information in the nature of a writ of mandamus, or by such other process as he may deem efficacious, to enforce such compliance.

St. 1895, c. 378, provides that "street railway companies, operating cars propelled by any motive power other than horse power, shall equip their cars when in use with such fenders and wheel guards as may be required by the board of railroad commissioners, and said board shall have power from time to time to modify its requirements." Section 2 of the same act provides that "it shall be the duty of said board, within three months after the passage of this act, to notify street railway companies doing business in this Commonwealth of its requirements under the preceding section." The act further provides a penalty of fifty dollars a day for neglect to comply with the requirements of the board.

After the passage of this act, to wit, Aug. 14, 1895, the board of railroad commissioners issued an order containing certain requirements and regulations with regard to the use of fenders by street railway companies.

In December, 1895, the present petitioner petitioned the board of railroad commissioners, setting forth the above act and order, and praying that the West End Street Railway Company be compelled to show whether or not they had complied with the orders; and, if not, why they should not be compelled to comply with the

requirements of the orders of the railroad commissioners as above, and why penalties should not be collected. A hearing was appointed on this petition for Feb. 5, 1896.

The board, after hearing the parties, declined to grant the petition or to act in the premises. The present petition claims that the proceedings of the board were not conducted in good faith, and requests the attorney-general to proceed against the company, as above stated.

It is plain that the collection of the penalty prescribed by St. 1895, c. 378, is no part of the duty of this office. Pub. Sts., c. 217, §§ 1 and 2, provide that all penalties for neglect of any duty imposed by statute, where no provision is made by law, shall be paid to the respective counties; and that when the penalty exceeds one hundred dollars it shall, unless otherwise specially provided by law, be prosecuted and recovered by indictment in the superior court. Such a proceeding belongs to the district attorney in the district where the offence is committed.

The petitioner asserts that the attorney-general may proceed under Pub. Sts., c. 17, § 4, which provides that the attorney-general may, "when, in his judgment, the interests of the Commonwealth require it, file and prosecute informations or other processes against persons who intrude on the lands, rights or property of the Commonwealth, or commit or erect any nuisance thereon." This provision, which first appeared in 1849, when the office of the attorney-general was re-established, and which has been continued until the present time in substantially the same form, confers no new jurisdiction upon this office, but is rather a statutory declaration of powers which were already inherent in the office. There is no occasion to consider the power of this office to proceed upon the section referred to, for it is well settled that the attorney-general can proceed by an information in the nature of a writ of mandamus against any corporation which fails in the performance of a duty owed by the corporation to the public. (Attorney-General *v.* Boston, 123 Mass. 479; Attorney-General *v.* Old Colony Railroad Company, 160 Mass. 62, 80.) The true question which arises upon the petition is whether it was the intention of the legislature to impose upon the attorney-general any duty of action in this case until requested so to do by the railroad commissioners. The statutes which give jurisdiction to the railroad commissioners in relation to railroads are broad and comprehensive. Pub. Sts., c. 112, § 14, provides that "the board [of railroad commissioners] shall have the general supervision of all railroads and railways, and shall examine the same; and the commissioners shall keep

themselves informed as to the condition of railroads and railways, and the manner in which they are operated with reference to the security and accommodation of the public, and as to the compliance of the several corporations with their charters and the laws of the Commonwealth." Section 15 of the same chapter provides that "the board, whenever in its judgment any such corporation has violated a law or neglects in any respect to comply . . . with the provisions of any law of the Commonwealth, shall give notice thereof in writing to such corporation, and if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney-general, who shall take such proceedings thereon as he may deem expedient."

By St. 1895, c. 378, therefore, the board of railroad commissioners is authorized to regulate the fenders to be used by street railways. By the section of the Public Statutes above quoted it is further required to keep itself informed as to the manner in which the law is obeyed, and to that end may summon witnesses, administer oaths and take testimony (Pub. Sts., c. 112, § 25); and if, in its judgment, the company has violated any law, it may present the facts to the attorney-general, who shall thereupon take such proceedings as he may deem expedient.

I am of opinion that the intention of the legislature in the statutes quoted was to charge the railroad commissioners with the responsibility of supervision over railroads and railways, including street railways, and that no duty in the premises is imposed upon the attorney-general until complaint has been made to him by the board. It is not to be supposed that two departments of government are charged with concurrent duty over the same subject matter; and, as the whole subject matter is, in express terms, placed in the hands of the railroad commissioners, the necessary inference is that the attorney-general is to that extent relieved.

Nor do I think that it was intended that there should be any jurisdiction in the nature of an appeal from the acts of the railroad commissioners to the attorney-general. The duties of that board are performed by its members, under the general authority, direction and control of the executive department; and if they fail in the performance of their statutory duty, the remedy of the citizen is by appeal to the appointing power. While it is the duty of the attorney-general to see that the laws of the Commonwealth are enforced and its interests protected, yet, when that duty as to any specific matter is clearly conferred upon another department of government, his responsibility must be taken to be to that extent transferred to that department.

I deem it my duty, therefore, not to entertain the petition. This conclusion is reached without forming or expressing any opinion upon the question whether the petitioner is, as he alleges, justly aggrieved at the action of the railroad commissioners.

HOSEA M. KNOWLTON, *Attorney-General.*

ATTORNEY-GENERAL *ex rel.* WILLIAM F. NYE *v.* ONSET BAY GROVE ASSOCIATION.

JULY 13, 1896.

This was an application to the attorney-general for the filing of a bill in equity by him against the Onset Bay Grove Association for the forfeiture of its charter, upon the ground that it has exceeded its authority by using the funds of the corporation for the carrying on of business not authorized by its act of incorporation.

The following facts appeared at the hearing. The Onset Bay Grove Association was incorporated by St. 1877, c. 98. By the provisions of this act the persons named therein were made a corporation "for the purpose of holding personal property and real estate, where a wharf, hotel and other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages." The petitioner in this case is William F. Nye, who was one of the persons named in the act of incorporation. He is and has been for many years one of the officers of the corporation, and has been largely interested in its affairs.

All of the incorporators were of the religious sect called Spiritualists, and obtained their act of incorporation in order that they might establish at Onset Bay a religious camp meeting and a summer resort for those desiring to attend such meetings. In pursuance of this purpose, after obtaining their act of incorporation, they purchased a large tract of land desirably situated on the shores of Onset Bay, and proceeded to lay it out into streets, avenues, squares and building lots. Some of the land was reserved in the original lay-out for the purpose of erecting thereon a tabernacle in which to carry on religious meetings. A speaker's stand was erected upon one of these lots, and seats and other fixtures provided for the purpose. The lots were sold in large numbers, at first principally to Spiritualists, and afterwards, to some extent, to others. Hotels, stores and other buildings adapted to the wants of a summer population have been erected. A large summer settlement has been built up, composed of people drawn thither partly by the beauty of the location, but largely on account of the religious services held there during the summer months. These

services differ somewhat from those of other denominations, and attract, and, perhaps, are intended to attract, many people to them who are not interested or believers in the denomination under whose auspices they are carried on. A brass band is engaged to furnish sacred and popular music, and speakers of reputation are procured to deliver addresses. These meetings are largely attended, both by those owning or occupying cottages in the settlement and by others who come to the place for that purpose, and they constitute a principal feature of the resort.

Meetings of this character have been held since the organization of the company, and have been carried on by the corporation and paid for out of the income received by it from rentals of its property. The present petitioner was active in establishing and carrying on these meetings from the beginning, for many years, and until some time in the spring of 1895. But on the twenty-seventh day of May, 1895, the petitioner, having been advised that it was doubtful whether under its charter the corporation had the right to carry on these meetings and appropriate its funds therefor, notified his fellow directors in writing to that effect, and requested them to take proper action to discontinue such use of the funds of the corporation.

Thereupon, to wit, on the sixth day of July, 1895, a meeting of the directors was held, at which Mr. Nye, although notified, was not present, and a vote was passed by which a large part of the property of the corporation was leased to a number of persons, being, in fact, all of the directors except Mr. Nye. The lessees were described in the lease as co-partners, doing business under the name of the Onset Bay Grove Camp Meeting Association. The term of the lease was seven years, and the rental was "one-half of the net profits that might accrue or come to them from the use of said property."

On the twenty-second day of May thereafter a special meeting of the stockholders was held, upon due notice, to see if the stockholders would vote to ratify and confirm said lease; and it was voted at said meeting that the lease be ratified, fifty-seven votes being cast in favor of the ratification and forty-one against it.

Thereupon the lessees took possession of the property so leased, collected the rentals, and, after paying over one-half thereof to the treasurer of the corporation, have used the other one-half thereof in conducting meetings substantially as they had been previously conducted. It was admitted by the petitioner at the hearing that no pecuniary profit resulted to the lessees from the execution of the lease; and he did not charge that the lease was void as being made for their profit, advantage or benefit, or to defraud the stock-

holders, nor did he dispute that the association had authority under its charter to execute a lease of its real estate.

He claims, however, that the lease was executed for the purpose of evading the provisions of the charter of the association, and is merely a device for the diversion of the property of the association to a use not authorized by its charter. It is upon this ground that he asks that the charter be annulled.

Upon these facts I am of the opinion that a case is not stated which requires or justifies the exercise of the discretion of the attorney-general to institute a proceeding of this character. Even if it be conceded that the lease is a mere device to evade the restrictions of the charter, it does not seem to me to be such an abuse of corporate powers as calls for its revocation. No harm to the community or to any individual can be said to result therefrom. On the contrary, the principal purpose for which the charter was sought by those who were named as incorporators, including this petitioner himself, to wit, that of carrying on religious meetings after the manner of Spiritualists, is thereby accomplished. Petitions of this character are addressed to the sound discretion of the attorney-general, and he should not lend his name to the revocation of a charter unless it appears that the misuse of corporate powers is unlawful or mischievous, or is in fraud of the rights of the stockholders, or is against public policy. I do not think that the Commonwealth is called upon to revoke the charter of a corporation organized for religious purposes, whose only abuse of its charter is the carrying on of such meetings, and when the abuse of chartered powers is at most technical merely, and not harmful.

The petitioner certainly has no just cause for complaint upon this ground. He himself, as officer and director of the corporation, has long been instrumental and active in establishing and promoting such meetings, and upon the faith of the continuance of the policy of the company, which he himself helped to establish, many permanent residents have undoubtedly been induced to purchase land and build and occupy summer houses. So far as he is concerned, his good faith is pledged rather to sustain such meetings than to have them discontinued.

But I do not think that even a technical abuse of corporate powers has been committed by the corporation. The only act which has been complained of is that it has leased a portion of its property. This it had a clear right to do. No complaint is made that the lease is improvident, or made for purposes of private gain. The terms and conditions of the lease are within the clear authority of the charter. The mere fact that it was made so that

the lessees could carry on a business which was forbidden to the corporation itself is not, in my opinion, sufficient to invalidate the lease, or render the act of the corporation *ultra vires*. The transaction does not come within the principles of law which invalidate acts colorably done for purposes of fraud or evasion. The lease executed by the corporation was within its authority. It does not become illegal as a corporate act, because the purpose of the lease was to enable the lessees to do what the incorporators could not do.

HOSEA M. KNOWLTON, *Attorney-General.*

INFORMATIONS.

1. At the Relation of the Treasurer and Receiver-General.

(*a*) For the non-payment of corporation taxes for the year 1895, informations were brought against the —

A. N. Gardner Hardware Company. Tax paid and information dismissed.

Allen Fan Company. Enjoined.

Bay State Metal Works. Tax paid and information dismissed.

Berlin Falls Fibre Company. Tax paid and information dismissed.

Boston Casting Company. Enjoined.

Boston Engraving and McIndoe Printing Company. Tax paid and information dismissed.

Boston Flint Paper Company. Tax paid and information dismissed.

Brookfield Brick Company. Tax paid and information dismissed.

Charles A. Millen Company. Tax paid and information dismissed.

Chelsea Wire Fabric Rubber Company. Enjoined.

Chequassett Lumber Company. Tax paid and information dismissed.

Clemons Electrical Manufacturing Company. Tax paid and information dismissed.

Commonwealth Publishing Company. Enjoined.

Damon Safe and Iron Works. Tax paid and information dismissed.

The Dunne Lyceum Company. Tax paid and information dismissed.

E. W. Walker Company. Enjoined.

Eastman Clock Company. Enjoined.

Franklin Educational Company. Tax paid and information dismissed.

George H. Underhill Company. Enjoined.

Gloucester Water Supply Company. Pending.

Hampden Watch Company. Pending.

Haverhill Roller Toboggan Company. Tax paid and information dismissed.

Horace Partridge Company. Tax paid and information dismissed.

Jewett Lumber Company. Tax paid and information dismissed.
Journal Printing Company. Tax paid and information dismissed.
Lamprey Boiler Furnace Mouth Protector Company. Tax paid and information dismissed.
Lend A Hand Publishing Company. Tax paid and information dismissed.
Lowell Iron Company. Tax paid and information dismissed.
Massasoit Clothing Company. Enjoined.
Meyer Putz Pomade Company. Tax paid and information dismissed.
New England Rattan Company. Enjoined.
Norton Iron Company. Tax paid and information dismissed.
Parker Brothers Company. Enjoined.
Pearson Box and Moulding Company. Tax paid and information dismissed.
People's Electric Street Railway Company. Tax paid and information dismissed.
Pittsfield Brass Company. Tax paid and information dismissed.
Pranker Manufacturing Company. Tax paid and information dismissed.
Progressive Co-operative Association. Insolvent. Claim proved.
Quaboag Steamboat Company. Tax paid and information dismissed.
Quinsigamond Co-operative Meat Market. Enjoined.
R. H. Long Shoe Company. Enjoined.
Robinson Printing Company. Previously enjoined by the department. Placed on file.
Salem and South Danvers Oil Company. Tax paid and information dismissed.
Sander Musical Instrument Company. Insolvent. Claim proved.
Scandinavian Co-operative Mercantile Company. Tax paid and information dismissed.
Shady Hill Nursery Company. Tax paid and information dismissed.
Smith-Carleton Iron Company. Tax paid and information dismissed.
Standard Crockery and House Furnishing Company. Tax paid and information dismissed.
Standard Horse Shoe Company. Tax paid and information dismissed.
Standard Worsted Company. Enjoined.
Standard Worsted Company of Lowell, Mass. Enjoined.
Sumner Drug and Chemical Company. Tax paid and information dismissed.

Thompson & Odell Company. Tax paid and information dismissed.
Underhill Warming and Ventilating Company. Enjoined.
W. C. Young Manufacturing Company. Tax paid and information dismissed.
W. F. Adams Company. Tax paid and information dismissed.
W. J. Thompson & Co. Corporation. Pending.
Willey Company. Pending.
William H. Keeden Printing Company. Tax paid and information dismissed.
William H. King Sons Company. Tax paid and information dismissed.
William J. Dinsmore Corporation. Tax paid and information dismissed.

(*b*) For failure to file the tax return for the year 1895 required by section 38 of chapter 13 of the Public Statutes, informations were brought against the —

Adams Power Company. Return filed. Information dismissed.
Albermarle Slate Company. Return filed. Information dismissed.
American Bedstead Company. Return filed. Information dismissed.
American Publishing Company. Return filed. Information dismissed.
Andover Press (Limited). Return filed. Information dismissed.
Anthony-Bates Machine Company. Return filed. Information dismissed.
Arlington Hotel Company. Return filed. Information dismissed.
Atherton Machine Company. Return filed. Information dismissed.
Atlas Pulp Company. Return filed. Information dismissed.
Bay State Biscuit Company. Pending.
Bay State Metal Works. Return filed. Information dismissed.
Berkshire Electric Light, Heat and Power Company. Return filed. Information dismissed.
Blue Hill Granite Company. Return filed. Information dismissed.
Blair Camera Company. Return filed. Information dismissed.
Blair Manufacturing Company. Return filed. Information dismissed.
Boston Incandescent Lamp Company. Placed on file.
Boston Cordage Company. Return filed. Information dismissed.
Braintree Shoe Manufacturing Company. Pending.
Brookfield Shoe Company. Return filed. Information dismissed.

Brookfield Brick Company. Return filed. Information dismissed.

Burleigh Rock Drill Company. Return filed. Information dismissed.

C. A. Edgarton Manufacturing Company. Return filed. Information dismissed.

Cantello Manufacturing Company. Return filed. Information dismissed.

Cape Ann Drop Forge Works. Return filed. Information dismissed.

Cape Ann Granite Railroad Company. Return filed. Information dismissed.

Casino Art Company. Enjoined.

Chelmsford Foundry Company. Return filed. Information dismissed.

Chelsea Cordage Company. Return filed. Information dismissed.

Chelsea Wire Fabric Rubber Company. Enjoined.

Chequassett Lumber Company. Return filed. Information dismissed.

Clark W. Bryan Company. Return filed. Information dismissed.

Citizens' Gas Light Company of Reading, South Reading and Stoneham. Pending.

Commonwealth Shoe and Leather Company. Return filed. Information dismissed.

Dean Whitney Elevator Company. Pending.

Dedham Lumber Company. Return filed. Information dismissed.

Elastic Box Toe Co-operative Association. Return filed. Information dismissed.

Electrodus Company. Return filed. Information dismissed.

Engraver and Printer Company. Enjoined.

F. P. Cox Laundry Company. Return filed. Information dismissed.

Fall River Daily Globe Publishing Company. Return filed. Information dismissed.

Faulkner Manufacturing Company. Return filed. Information dismissed.

Fiedler Silk Manufacturing Company. Pending.

Fisher-Churchill Company. Return filed. Information dismissed.

Fiske Wharf and Warehouse Company. Return filed. Information dismissed.

Frank Keene Co. Return filed. Information dismissed.

Franklin Water Company. Return filed. Information dismissed.

G. W. H. Litchfield Company. Return filed. Information dismissed.

Gardner Egg Carrier Company. Return filed. Information dismissed.

George H. Underhill Company. Previously enjoined by this department. Placed on file.

George H. Wood Company. Return filed. Information dismissed.

German-American Publishing Company. Return filed. Information dismissed.

Great Pasture Company. Return filed. Information dismissed.

Greylock Co-operative Creamery Association. Return filed. Information dismissed.

Granite Shoe Company. Return filed. Information dismissed.

H. A. Davis Company. Enjoined.

Hampden Woolen Company. Return filed. Information dismissed.

Hardy Company. Return filed. Information dismissed.

Haverhill Paper Company. Return filed. Information dismissed.

Horace Partridge Company. Return filed. Information dismissed.

Hoxie Mineral Soap Company. Return filed. Information dismissed.

Hunt-Spiller Manufacturing Company. Return filed. Information dismissed.

Hurley Shoe Company. Return filed. Information dismissed.

Hutchins Machine Company. Return filed. Information dismissed.

Hyde Park Co-operative Association. Return filed. Costs not paid. Pending.

Instant Freezer Company. Return filed. Information dismissed.

J. G. Boutelle Company. Return filed. Information dismissed.

J. H. Whitney Company. Enjoined.

James Hunter Machine Company. Return filed. Information dismissed.

James Russell Boiler Works Company. Return filed. Information dismissed.

Jameson & Knowles Company. Return filed. Information dismissed.

John F. Fowkes Manufacturing Company. Enjoined.

John Pilling Shoe Company. Return filed. Information dismissed.

Joss Brothers Company. Return filed. Information dismissed.

Journal Printing Company. Return filed. Information dismissed.

L. A. May Company. Return filed. Information dismissed.

Lakeside Manufacturing Company. Return filed. Information dismissed.

Liberty Masonic Association. Return filed. Information dismissed.

Lithuanian and Polish Publishing Company. Pending.

Mansfield Co-operative Furnace Company. Return filed. Information dismissed.

Marlborough Gas Light Company. Return filed. Information dismissed.

Martha's Vineyard Electric Light and Power Company. Return filed. Information dismissed.

Massasoit Clothing Company. Previously enjoined by the department. Placed on file.

Massachusetts Publishing Company. Return filed. Information dismissed.

Massachusetts Real Estate Company. Return filed. Information dismissed.

Meadow Company. Return filed. Information dismissed.

Metallic Goods Company. Return filed. Information dismissed.

Methyl Dental Company. Return filed. Information dismissed.

Middlesex Land Company. Return filed. Information dismissed.

Mt. Washington Glass Company. Return filed. Information dismissed.

Mutual Gas Light Company of West Springfield. Pending.

N. W. Turner Company. Return filed. Information dismissed.

National Papeterie Company. Return filed. Information dismissed.

Newport Transfer Express Company. Return filed. Information dismissed.

Nipmuc Paper Company. Return filed. Information dismissed.

Norton Iron Company. Return filed. Information dismissed.

Pairpoint Manufacturing Company. Return filed. Information dismissed.

People's Electric Street Railway Company. Return filed. Information dismissed.

Phœnix Rattan Company. Return filed. Information dismissed.

Plymouth Stove Company. Pending.

Progress Co-operative Association. Pending.

Quincy Market Cold Storage Company. Return filed. Information dismissed.

R. H. Long Shoe Company. Return filed. Information dismissed.

Rockland Hotel Company. Return filed. Information dismissed.

Rutland Co-operative Creamery Association. Enjoined.

Samuel Winslow Skate Company. Return filed. Information dismissed.

Scituate Water Company. Return filed. Information dismissed.

Sewall & Day Cordage Company. Return filed. Information dismissed.
Simpson Spring Company. Return filed. Information dismissed.
Singapore Rattan Company. Return filed. Information dismissed.
Smith-Foster Shoe Company. Return filed. Information dismissed.
Somerville Citizen Company. Return filed. Information dismissed.
Springfield Door, Sash and Blind Company. Return filed. Information dismissed.
Springfield Steam Power Company. Return filed. Information dismissed.
Standard Brick Company. Return filed. Information dismissed.
Standard Cordage Company. Return filed. Information dismissed.
Standard Crockery and House Furnishing Company. Return filed. Information dismissed.
Standard Horse Shoe Company. Return filed. Information dismissed.
Standard Worsted Company. Enjoined.
Standish Worsted Company. Return filed. Information dismissed.
Taunton Evening News. Return filed. Information dismissed.
Traveller Publishing Company. Return filed. Information dismissed.
Tremont Publishing Company. Return filed. Information dismissed.
Trench Lamp Company. Return filed. Information dismissed.
Tyler & Moulton Shoe Company. Return filed. Information dismissed.
Underhill Warming and Ventilating Company. Enjoined.
Union Desk Company. Return filed. Information dismissed.
United Manufacturing Company. Enjoined.
Union Marine Railway. Enjoined.
United States Finance Company. Return filed. Information dismissed.
W. D. Wilmarth & Co. Corporation. Return filed. Information dismissed.
W. F. Adams Company. Return filed. Information dismissed.
Wachusett Milk Company. Return filed. Information dismissed.
Wachusett Shirt Company. Return filed. Information dismissed.
Wakefield Water Company. Return filed. Information dismissed.
Walkerwood Chemical Company. Enjoined.
Waltham Watch Tool Company of Springfield, Mass. Return filed. Information dismissed.

Warwick Cycle Manufacturing Company. Return filed. Information dismissed.
Westfield Brick Company. Return filed. Information dismissed.
Wheelman Company, The. Return filed. Information dismissed.
William H. King Sons Co. Return filed. Information dismissed.
Woodward & Brown Piano Company. Return filed. Information dismissed.

2. At the Relation of the Commissioner of Corporations.

(*a*) For failure to file the certificate of condition required by section 54 of chapter 106 of the Public Statutes —

Clark W. Bryan Company. Certificate filed. Information dismissed.

(*b*) For failure to file statement required by St. 1891, c. 341, and St. 1894, c. 541 —

Boston Health Company. Statement filed. Marked case off list.
Lock Stub Check Company. Enjoined.

3. At the Relation of Private Persons.

Attorney-General *ex rel.* Lowell Institution for Savings *et al. v.* Warren Sherburne. Information to prevent building on public way and square. Hearing and use of name granted.

Applications Refused and Otherwise Disposed of.

[For full text of opinions giving reasons for refusal, see page 80.]

Attorney-General *ex rel. v.* Horace N. Conn. Petition for use of name in an information to try defendant's title to the office of president of the common council of Woburn. Hearing and use of name denied.

Attorney-General *ex rel.* William F. Nye *v.* Onset Bay Grove Association. Petition for use of name in an information in the nature of *quo warranto* to annul the respondent's charter. Hearing and use of name denied.

Attorney-General *ex rel.* William E. Patrick *et als.*, selectmen of Warren, *v.* Patrick Burns. Petition for use of name in an information to remove an obstruction to a public highway. Pending.

Attorney-General *ex rel.* Joseph Lundy *v.* West End Street Railway Company. Petition alleging that said company has failed to comply with the orders of the railroad commissioners as

to the use of fenders upon its cars, and requesting the attorney-general to proceed by an information in the nature of a writ of mandamus to enforce such compliance. Petition denied.

Attorney-General *ex rel. v.* Vineyard Grove Company. Petition for use of name in an information for an injunction restraining the said company from an alleged interference with the rights of the public in a sea beach, and ordering the removal of structures causing such alleged interference. Two hearings given. Pending.

GRADE CROSSINGS.

Since the last annual report notice has been served upon the attorney-general of petitions for the appointment of special commissioners under chapter 428 of the Acts of 1890 and amendments thereof, relating to the abolition of grade crossings in the following localities: —

Essex County.

Beverly. Directors of the Boston & Maine Railroad, petitioners. Pending.

Hampden County.

Springfield. Mayor and aldermen of Springfield and directors of the Boston & Albany Railroad Company, petitioners. Pending.

Westfield. Selectmen of the town of Westfield, petitioners. Pending.

Springfield. Mayor and aldermen of Springfield, petitioners. Pending.

Hampshire County.

Ware. Selectmen of the town of Ware, petitioners. Pending.

Middlesex County.

Arlington. Selectmen of the town of Arlington, petitioners. Pending.

Ayer. Selectmen of the town of Ayer and directors of the Fitchburg Railroad Company, petitioners. Pending.

Cambridge. The Boston & Lowell Railroad, by its lessee, the Boston & Maine Railroad, petitioner. Pending.

Concord. Selectmen of the town of Concord and directors of the Fitchburg Railroad Company, petitioners. Pending.

Norfolk County.

Braintree. Directors of the New York, New Haven & Hartford Railroad Company, petitioners. Pending.

Dedham. Selectmen of the town of Dedham, petitioners. Pending.

Dedham. New York, New Haven & Hartford Railroad Company, petitioner. Pending.

Hyde Park. New York, New Haven & Hartford Railroad Company, petitioner. Pending.

Hyde Park. New England Railroad Company, petitioner. Pending. (This case and the two preceding were consolidated.)

Medway. Selectmen of the town of Medway, petitioners. Pending.

Plymouth County.

Hingham. New York, New Haven & Hartford Railroad Company, petitioner. Pending.

Middleborough. Selectmen of the town of Middleborough, petitioners. Pending.

Suffolk County.

Boston. Mayor and aldermen of Boston, petitioners. Pending.

Worcester County.

Blackstone. Selectmen of Blackstone, petitioners. Pending.

Gardner. Selectmen of the town of Gardner, petitioners. Pending.

Leominster. Selectmen of the town of Leominster, petitioners. Pending.

Millbury. Selectmen of the town of Millbury, petitioners. Pending.

Sutton. Selectmen of the town of Sutton, petitioners. Pending.

The following corporations having made voluntary application to the supreme judicial court for dissolution, and having given the attorney-general due notice of their petition, and the tax commissioner having certified that they were not indebted to the Commonwealth for taxes, the attorney-general waived the right to be heard: —

Arena Newspaper Company.
Avon Shoe Company.
Belvidere Union Mission School.
Boston Cab Company.
Boston Terra Cotta Company.
Boston Cold Storage and Freezing Company.
Brockton and Stoughton Street Railway Company.
Cambridge Vinegar Company.
Chebacco House Company.
City Job Print Company.
East Brookfield Woolen Company.
Elofson Soap and Perfumery Company.
Fall River Automatic Lighting Company.
Flax Leather Manufacturing Company.
High Rock Granite Company.
Hyde Park Company.
Lexington Water Company.
Mason Regulator Company.
Muddy Pond Company.
New England Night Lunch Wagon Company.
North Brookfield Shoe Company.
Pease Machine Tool Company.
Proprietors of the Liverpool Wharf.
Recording Instrument Company.
Robinson Brothers Shoe Company.
Rotch Wharf Company.
S. R. Niles Advertising Agency.
Shorey Spring Bed and Roller Company.
Stevenson Manufacturing Company.
Suffolk Company.
United States Watch Company.
W. H. Blake Steam Pump Company.
Wright Wire Company.

The following corporations, reported to this department by the tax commissioner for delinquency in making their tax returns under Pub. Sts., c. 13, § 38, have been compelled, without the necessity of a suit at law, to comply with the statute: —

Algonquin Printing Company.
American Gem Cutting Company.
Columbia Rubber Company.
Commonwealth Publishing Company.
Drainage Construction Company.
Eureka Ruling and Binding Company.
Fairfield Paper Company.
Horn and Supply Company.
J. L. & T. D. Peck Manufacturing Company.
L. E. Knott Apparatus Company.
Lend a Hand Publishing Company.
Lynn Express Company.
Oak Grove Creamery Company.
People's Lumber and Manufacturing Company.
Quaboag Steamboat Company.
Suffolk Brewing Company.
Williamsburg Co-operative Creamery Association.

CASES ARISING UNDER THE COLLATERAL INHERITANCE TAX ACT.

[Statutes 1891, chapter 425.]

Frank Brewster, executor of the will of Julia Dana Whitney, *v.* the Treasurer of the Commonwealth *et al.* Petition to the probate court of Suffolk county. Judgment of probate court approved by agreement.

L. Frances P. Lefavour, executrix of the will of Joseph W. Lefavour, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Essex county. Answer filed. Decree.

Henry H. Root, executor of the will of Joseph H. Root, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth. Petition to the probate court of Franklin county. Right to hearing waived. Decree.

Mary I. Cooper, petitioner under the will of Abby I. Cooper, *v.* E. P. Shaw, Treasurer of the Commonwealth. Petition to the probate court of Hampshire county. Answer filed. Right to hearing waived. Decree.

Henry W. Eager, executor of the will of Ellen F. Lane, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Middlesex county. Hearing waived. Decree.

Kimball Webster, executor of the will of Almira G. Lawrence, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Essex county. Decree.

Eliza R. Noyes, legatee under the will of William N. Connor, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth. Petition to the probate court of Suffolk county. Hearing waived. Decree.

George V. Leverett *et al.*, executors of the will of William Leverett Chase, petitioners, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Norfolk county. Service accepted. Hearing waived. Decree.

John C. Haynes *et al.*, trustees under the will of James G. Haynes, petitioners, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Suffolk county. Decree.

William F. Apthorp, executor of the will of Sarah H. Hunt, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Essex county. Service accepted. Hearing waived.

Kimball Webster, executor of the will of Almira G. Lawrence, petitioner, *v.* E. P. Shaw, Treasurer of the Commonwealth, *et als.* Petition to the probate court of Essex county. Hearing waived.

James H. Callahan, executor of the will of James A. Winslow, petitioner. Petition to the probate court of Suffolk county. Answer filed.

William S. Dexter, executor, and William S. Dexter, Edward W. Hooper and Francis C. Welch, trustees, under the will of Martin Brimmer, petitioners, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Suffolk county. Service accepted and right to hearing waived.

Mary E. Wilson *et als.*, executors of the will of Sally A. Dwight, petitioners, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Suffolk county. Answer filed.

Lorenzo White, executor of the will of Charles F. Stoddard, petitioner, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Suffolk county. Service accepted.

Eliza R. Noyes, petitioner, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Suffolk county. Service accepted. Hearing waived.

William P. Porter and Alfred T. Folsom, executors of the will of Alfred Rowe, petitioners, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Hampden county. Hearing waived.

James H. Frothingham, executor of the will of Joseph Frothingham, petitioner, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Essex county. Answer filed.

William E. Hutchins, executor of the will of Jacob B. Remick, petitioner, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Middlesex county. Hearing waived.

J. J. Sullivan, executor of the will of Catherine A. Kelly, petitioner, *v.* the Treasurer of the Commonwealth. Petition to the probate court of Middlesex county. Answer filed.

PUBLIC CHARITABLE TRUSTS.

Martius A. Gates *et als.*, trustees of the estate of Abijah M. Savery, petitioners. Petition to the probate court of Worcester county for allowance of trustees' final account. Hearing waived. Decree.

St. Walston Society *v.* Attorney-General *et al.* Petition to the supreme judicial court of Worcester county to reconvey land. Answer.

Essex Agricultural Society *v.* Massachusetts General Hospital Corporation and the Attorney-General. Petition to the supreme judicial court of Essex county to sell real estate and to apply the doctrine of *cy-pres*. Service accepted. Pending.

John K. Warren, petitioner, *v.* Attorney-General *et als.* Petition to the probate court of Worcester county to convey real estate to carry out a public charitable trust. Service accepted. Pending.

Boston Society of Natural History *v.* Attorney-General. Bill in equity in the supreme judicial court of Suffolk county for instructions. Waived the right to be heard.

Charles H. Goulding *et als.*, School Committee of Peabody, petitioners. Bill in equity in the supreme judicial court of Essex county praying for a decree declaring a certain fund a public charitable gift. Service accepted. Pending.

Nelson S. Bartlett *et als.*, petitioners, executors of the will of Samuel E. Sawyer, *v.* Attorney-General *et als.* Petition to the probate court of Essex county for the construction of a will. Answer of the attorney-general, waiving right to be heard.

George White and Francis C. Welch, trustees of the will of Ann White Vose, *v.* Attorney-General *et al.* Bill in equity in the supreme judicial court of Suffolk county for instructions in carrying out a public charitable trust. Answer filed.

Benjamin Dean, petitioner, *v.* Catherine N. Bowers *et als.* Petition to the supreme judicial court of Middlesex county. Attorney-general waived the right to be heard.

William B. Bacon *et als. v.* Augustus Hemenway, 2d, fourteen others and the Attorney-General. Petition to the supreme judicial court of Suffolk county for a decree determining to whom certain money in the hands of trustees under the will of Augustus Hemenway should be distributed. Pending.

Patrick A. Collins, trustee under the will of Mary Kelly, *v.* Thomas McCabe and John J. Williams. Petition to the probate court of Suffolk county for a decree declaring trust terminated and ordering payment. Pending.

Hiram M. Burton, petitioner. Petition to the probate court of Suffolk county for the appointment of a trustee under the will of Patrick Murray, establishing a trust for destitute Roman Catholic children. The attorney-general waived the right to be heard.

Josiah G. Coburn, executor, *v.* Andrew Geyer. Appeal to the supreme judicial court of Suffolk county from the allowance of the will of Mary F. Geyer. The testatrix having made certain public charitable gifts in her will, the attorney-general entered his appearance, but waived the right to be heard.

Hiram M. Burton, petitioner. Petition to the probate court of Suffolk county for license to sell real estate free from a charitable trust. The attorney-general waived the right to be heard.

George B. Foster, petitioner. Petition to the probate court of Essex county to be appointed trustee of a certain estate to establish and support a free school in Boxford. The attorney-general waived the right to be heard.

The following cases have been brought for alleged land damages incurred in the alteration of grade crossings. The Commonwealth, being obliged under the statutes to pay at least twenty-five per cent. of the expenses incurred in the alteration of all grade crossings, has in all cases been made a party thereto.

John W. Walcott *v.* Boston & Albany Railroad Company. Superior court, Middlesex county.

John T. Kenney *v.* Old Colony Railroad Company. Superior court, Suffolk county.

Daniel N. Kenney *v.* Old Colony Railroad Company. Superior court, Suffolk county.

H. B. Smith Company *v.* City of Northampton. Superior court, Hampshire county.

Ellen I. Guilford *et al. v.* City of Northampton. Superior court, Hampshire county.

James Caffrey *v.* City of Northampton. Superior court, Hampshire county.

Thomas Quinn *v.* Connecticut River Railroad and Boston & Maine Railroad Company, lessee. Superior court, Hampshire county.

Johanna Quinn *v.* Connecticut River Railroad and Boston & Maine Railroad Company, lessee. Superior court, Hampshire county.

Henry Weeks *v.* Town of Holden. Superior court, Worcester county.

Nellie E. Moore *v.* Town of Holden. Superior court, Worcester county.

Suits Conducted by the Attorney-General in Behalf of State Boards and Commissions.

The following cases have been reported to this department by state boards and commissions, to be conducted by the attorney-general or under his direction, pursuant to the provisions of St. 1896, c. 490: —

1. Metropolitan Park Commission.

Petitions to the superior court for assessment of damages alleged to have been sustained by the taking of land by the said commission: —

Henry F. Nawn *v.* Commonwealth. Suffolk county. Pending.

Thomas Quigley *v.* Commonwealth. Middlesex county. Trial by jury. Verdict for petitioner for $6,978.

Laura W. Parker, wife of Charles Henry Parker, *v.* Commonwealth. Norfolk county. Pending.

Mary E. Lewin *v.* Commonwealth. Norfolk county. Settled by agreement for $18,000, with interest from date of taking, Dec. 12, 1893, to Dec. 29, 1896, without costs.

John R. Magullion, James W. Calnan, Margaret T. McCormack, *v.* Commonwealth. Suffolk county. Settled by agreement for $2,000, without costs.

Aaron D. Weld, Francis C. Welch, trustees, *v.* Commonwealth. Suffolk county. Pending.

Horace T. Stearns, Ellen M. Hollis, *v.* Commonwealth. Middlesex county. Pending.

Margaret T. McCormack *v.* Commonwealth. Suffolk county. Settled by agreement for $5,000, without costs.

Henry S. Grew and Edward S. Grew *v.* Commonwealth. Suffolk county. Pending.

Marshall Symmes *v.* Commonwealth. Middlesex county. Settled by agreement for $3,050, without costs.

Washington G. Benedict *v.* Commonwealth. Suffolk county. Trial before auditors. Award for the petitioner for $58,726, with interest from April 29, 1895.

Henry S. Grew and Edward S. Grew *v.* Commonwealth. Norfolk county. Pending.

Alonzo V. Lynde *v.* Commonwealth. Middlesex county. Pending.

Carrie Butler *v.* Commonwealth. Middlesex county. Settled by agreement for $450, without costs.

Mary E. Howe, Daniel C. Holden, William P. Hill, *v.* Commonwealth. Middlesex county. Settled by agreement for $900, without costs.

Alice F. Rooney *v.* Commonwealth. Norfolk county. Settled by agreement for $20,000, without costs.

Francis H. Bacon *v.* Commonwealth. Middlesex county. Settled by the metropolitan park commissioners.

Harriet E. Makechnie *v.* Commonwealth. Middlesex county. Settled by agreement for $3,100, without costs.

Helen L. Butterfield *v.* Commonwealth. Middlesex county. Trial by jury. Verdict for petitioner for $761.60.

Jonathan Munyan, Simeon Snow, Elmer P. Howe, trustees, *v.* Commonwealth. Middlesex county. Trial by jury. Verdict for the petitioners for $43,504.50.

Henry Lynde *v.* Commonwealth. Middlesex county. Same *v.* Same. Middlesex county. (These two cases were settled by agreement for $2,500, without costs.)

A. Cutter Sibley *v.* Commonwealth. Middlesex county. Pending.

Middlesex Fells Spring Company *v.* Commonwealth. Middlesex county. Pending.

Sarah A. Bacon *v.* Commonwealth. Middlesex county. Pending.

Richard Dexter, Samuel G. Dexter, *v.* Commonwealth. Middlesex county. Pending.

George A. Wilson *v.* Commonwealth. Middlesex county. Settled by agreement for $4,500, without costs.

Inhabitants of Stoneham *v.* Commonwealth. Middlesex county. Settled by agreement for $825, without costs.

Aaron B. Magoun *v.* Commonwealth. Middlesex county. Settled by agreement for $3,150, without costs.

Richard A. Lewis and eleven others *v.* Commonwealth. Norfolk county. Pending.

Caroline M. Bartlett *v.* Commonwealth. Middlesex county. Settled by agreement for $150, without costs. (This land was abandoned by the Commonwealth.)

George S. Hale, Joseph W. Homer, executors, and Radcliffe College, *v.* Commonwealth. Norfolk county. Pending.

Grace I. Butterfield *v.* Commonwealth. Middlesex county. Settled by agreement for $950, without costs.

Benjamin F. Dutton *v.* Commonwealth. Middlesex county. Pending.

Oak Island Grove Company *v.* Commonwealth. Suffolk county. Trial before auditors. Award for petitioner, for $24,953, with interest from Sept. 5, 1895, to Dec. 26, 1896, $1,961.67.

James L. Elliott *v.* Commonwealth. Middlesex county. Settled by agreement for $350, without costs.

Tobias Libby *v.* Commonwealth. Middlesex county. Settled by agreement for $5,500, without costs.

George W. Lord *v.* Commonwealth. Middlesex county. Settled by agreement for $11,500, without costs.

Patrick Daily *v.* Commonwealth. Suffolk county. Settled by agreement for $5,250, without costs.

Inhabitants of Hyde Park *v.* Commonwealth. Norfolk county. Pending.

Aaron D. Weld and Francis C. Weld, trustees, *v.* Commonwealth. Norfolk county. Pending.

Lizzie A. Damm *v.* Commonwealth. Suffolk county. Settled by agreement for $1,000, without costs.

Frederick C. M. Damm *v.* Commonwealth. Suffolk county. Settled by agreement for $1,000, without costs.

William C. Rietzel *v.* Commonwealth. Suffolk county. Settled by agreement for $500, without costs.

Mathilde E. Rietzel *v.* Commonwealth. Suffolk county. Settled by agreement for $500, without costs.

Charles A. White *v.* Commonwealth. Suffolk county. Pending.

Washington G. Benedict, A. D. McClellan, George S. Lee, trustees, *v.* Commonwealth. Suffolk county. Pending.

Annie Crowley *v.* Commonwealth. Suffolk county. Pending.

James H. Stark, Frederick J. Stark, trustees, *v.* Commonwealth. Suffolk county. Pending.

Jacob W. Seaver *v.* Commonwealth. Norfolk county. Pending.

Henry S. Benton, trustee, *v.* Commonwealth. Norfolk county. Pending.

Robert Blakie *v.* Commonwealth. Norfolk county. Pending.

Saco and Biddeford Savings Institution *v.* Commonwealth. Norfolk county. Pending.

Real Estate and Building Company *v.* Commonwealth. Norfolk county. Pending.

John C. Lincoln *v.* Commonwealth. Norfolk county. Pending.

George S. Lee, trustee, Andrew Webster, Arthur Reed, trustees, *v.* Commonwealth. Suffolk county. Pending.

George S. Lee, trustee, A. G. Webster, Arthur Reed, trustees, *v.* Commonwealth. Norfolk county. Pending.

Charles H. Crummett *v.* Commonwealth. Norfolk county. Pending.

Frank B. Homans, administrator, *v.* Commonwealth. Norfolk county. Pending.

Frank B. Homans *v.* Commonwealth. Norfolk county. Pending.

President and Fellows of Harvard College *v.* Commonwealth. Suffolk county. Pending.

J. Thomas Baldwin *v.* Commonwealth. Suffolk county. Pending.

Joseph F. Wilson *v.* Commonwealth. Suffolk county. Settled by agreement for $1,750, without costs.

George Putnam *et al.*, trustees under the will of James Russell Lowell, *v.* Commonwealth. Suffolk county. Pending.

Roxanna M. Chapman *v.* Commonwealth. Middlesex county. Pending.

Dennis P. Murphy *v.* Commonwealth. Suffolk county. Settled by agreement for $9,000, without costs.

James H. Page, trustee, *v.* Commonwealth. Middlesex county. Pending.

Samuel C. Lawrence *v.* Commonwealth. Middlesex county. Settled by the metropolitan park commissioners.

Emily H. Hayward *v.* Commonwealth. Middlesex county. Settled by agreement for $350, without costs.

2. Metropolitan Sewerage Commission.

(*a*) Petitions to the superior court for assessment of damages alleged to have been sustained by the taking of rights and easements in lands by the said commission.

City of Boston *v.* Commonwealth. Suffolk county. Pending.

Butchers' Slaughtering and Melting Association *v.* Commonwealth. Suffolk county. Trial by jury and verdict for the petitioner for $1. Petitioner alleged exceptions. Not yet argued.

Amos Stone *et al. v.* Commonwealth. Suffolk county. Pending.

John Griffin *v.* Commonwealth. Suffolk county. Pending.

City of Chelsea *v.* Commonwealth. Suffolk county. Pending.

Magee Furnace Company *v.* Commonwealth. Suffolk county. Trial by jury. Verdict for the petitioner for $5,985. Respondent alleged exceptions. Exceptions sustained. (See 166 Mass. 480.)

Michael J. Egan *v.* Commonwealth. Middlesex county. Settled by agreement.

Ellen M. Reardon *v.* Commonwealth. Middlesex county. Settled by agreement.

Edmund Reardon *v.* Commonwealth. Middlesex county. Settled by agreement.

Edmund Reardon *v.* Commonwealth. Middlesex county. This and the three preceding cases were settled by agreement for the total sum of $2,998.60, with interest $694.73, and costs $115.

Nicholas J. Penny *v.* Commonwealth. Middlesex county. Pending.

John Cochrane, Jr., *v.* Commonwealth. Middlesex county. Pending.

Cochrane Carpet Company *v.* Commonwealth. Middlesex county. Pending.

Lucretia T. Carr *et al. v.* Commonwealth. Middlesex county. Pending.

Elizabeth J. C. Mann *v.* Commonwealth. Middlesex county. Pending.

Joseph Stone *et al. v.* Commonwealth. Suffolk county. Pending.

Joseph Stone *et al. v.* Commonwealth. Middlesex county. Pending.

(*b*) Miscellaneous cases.

Mary E. Connolly *v.* Charles G. Craib. Action of tort in the superior court for Suffolk county to recover damages for personal injuries alleged to have been sustained by an employee of a contractor in the construction of the metropolitan sewer, the defendant being the inspector employed by the metropolitan sewerage commissioners. Pending.

Samuel Cabot *v.* Hosea Kingman *et als.* Action of tort in the superior court for Suffolk county for injury to the plaintiff's premises by the negligent removal of soil in constructing the metropolitan sewer. Trial by jury. Verdict for the defendants returned by direction of the court. Exceptions. Exceptions sustained. Case reported 166 Mass. 403.

Hosea Kingman *et als.*, petitioners. Petition to the supreme judicial court for Suffolk county for the appointment of commissioners to apportion the cost of constructing the Mystic and Charles River Valley systems of the metropolitan sewer. E. H. Bennett, John E. Sanford and E. C. Bumpus appointed commissioners. Report and award filed. Pending.

Hosea Kingman *et als.*, petitioners. Petition to the supreme judicial court for Suffolk county for the appointment of commissioners to apportion the cost of constructing the Neponset

River Valley system of the metropolitan sewer. Report and award filed. Pending.

Mary Rohan *v.* Commonwealth. Petition to the superior court for Suffolk county in the nature of an action of tort for personal injuries alleged to have been sustained in the construction of a section of the metropolitan sewer. Pending.

3. State Board of Lunacy and Charity.

(*a*) Actions of contract pending in the superior court for Suffolk county to recover charges for the support of insane paupers in state lunatic hospitals, under the provisions of Pub. Sts., c. 87, § 32.

George A. Marden, Treasurer, *v.* City of Cambridge.
Same *v.* Same.
Same *v.* Same.
Same *v.* Same.
Same *v.* Town of Peabody.
Same *v.* City of Waltham.
Henry M. Phillips, Treasurer, *v.* Town of Reading.
Same *v.* City of Worcester.
Same *v.* City of Cambridge.
Same *v.* City of Quincy.
Same *v.* Town of Stowe.
Edward P. Shaw, Treasurer, *v.* City of Boston.

(*b*) Bastardy complaints brought under Pub. Sts., c. 85.

Esther E. Bronner *v.* Charles E. Fox. Superior court, Suffolk county. Pending.

Margaret M. Fennessey *v.* Michael McCarthy. Superior court, Suffolk county. Pending.

Bridget Crotty *v.* Michael Welch. Superior court, Middlesex county. Pending.

Mary E. Gilleny *v.* Ira Pillar. Superior court, Suffolk county. Judgment for defendant by consent.

Mary Ready *v.* John L. Bowker. Superior court, Suffolk county. Settled by agreement.

MISCELLANEOUS CASES.

Charles A. Martin, petitioner, *v.* Marcello Hutchinson, superintendent of the Massachusetts Hospital for Dipsomaniacs and Inebriates. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus* to be released from the Massachusetts Hospital for Dipsomaniacs and Inebriates. Hearing before a justice of the supreme judicial court, and petition dismissed.

George S. Merrill, Insurance Commissioner, *v.* Right Arm Masonic Mutual Relief Association. Petition under St. 1895, c. 340, to the supreme judicial court for Suffolk county to have a receiver appointed and association dissolved. Injunction issued, and George H. Snow of Harwich appointed receiver.

Charles Endicott, Commissioner of Corporations, *v.* Barre Hotel Company. Petition to the supreme judicial court for Suffolk county, under Pub. Sts., c. 106, § 55, to dissolve said corporation for failure for two successive years to file the certificate due under Pub. Sts., c. 106, § 54.

Nicola Del Veichi *v.* Commonwealth. Petition to the supreme judicial court for Suffolk county for a writ of error to correct the judgment of the Newton police court. Plea. Judgment of lower court reversed and case remanded to same. Mandate issued.

Francis Wright *v.* John Berry and Commonwealth of Massachusetts, trustee. Trustee process in an action of contract. Referred to Oliver Stevens, District Attorney for Suffolk county.

George S. Merrill, Insurance Commissioner, *v.* Standard Mutual Fire Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and receiver under the provisions of St. 1894, c. 522, § 7. Injunction issued, and R. D. Weston-Smith appointed receiver.

George S. Merrill, Insurance Commissioner, *v.* Central Mutual Fire Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and a receiver under the provisions of St. 1894, c. 522, § 7. Injunction issued, and R. D. Weston-Smith, Esq., appointed receiver.

George S. Merrill, Insurance Commissioner, *v.* Wachusett Mutual Fire Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and a receiver under the provisions of St. 1894, c. 522, § 7. Injunction issued, and Henry W. Ware, Esq., appointed receiver.

National Contract and Supply Company *v.* George S. Merrill, Insurance Commissioner. Petition in the supreme judicial court for Suffolk county for an injunction to restrain the defendant from publishing certain articles, and from interfering with plaintiff's business. Demurrer. Demurrer sustained. Bill dismissed.

George S. Merrill, Insurance Commissioner, *v.* Milford Mutual Fire Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and a receiver under the provisions of St. 1894, c. 522, § 7. Injunction issued, and Wendell Williams, Esq., appointed receiver.

George S. Merrill, Insurance Commissioner, *v.* Excelsior Mutual Fire Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and a receiver under the provisions of St. 1894, c. 522, § 7. Injunction issued, and Edward I. Baker, Esq., appointed receiver.

Henry B. Lowrey, petitioner. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus*. Answer filed. Hearing. Writ refused.

George S. Merrill, Insurance Commissioner, *v.* Commerce Mutual Fire Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and the appointment of a receiver. Injunction issued, and Godfrey Morse, Esq., appointed receiver.

Bernard Riley, petitioner. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus* for release from the house of correction. Hearing, and petition dismissed.

New York, New Haven & Hartford Railroad Company and Providence & Worcester Railroad Company *v.* John E. Sanford *et als.*, Board of Railroad Commissioners. Petition to the supreme judicial court for Suffolk county for a writ of *certiorari*. Answer. Pending.

Harry Phillips, petitioner. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus*. Petition dismissed by consent.

George S. Merrill, Insurance Commissioner, *v.* Guardian Life Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and the appointment of a receiver. Injunction issued, and Frank D. Allen, Esq., appointed receiver.

Charles Ziemann *v.* Board of Registration in Medicine. Petition to the supreme judicial court for Suffolk county for a writ of *mandamus* to compel respondent to register the petitioner in accordance with St. 1894, c. 458. Demurrer. Demurrer overruled. Answer filed. Pending.

George S. Merrill, Insurance Commissioner, *v.* Security Live Stock Insurance Company. Petition to the supreme judicial court for Suffolk county for an injunction and the appointment of a receiver. Injunction issued, and Alpheus Sanford, Esq., appointed receiver.

Richard P. O'Reily *v.* Samuel Dalton *et als.* Petition to the supreme judicial court for Suffolk county for a writ of *certiorari*, claiming want of jurisdiction by the board appointed under St. 1893, c. 367, § 65, in the matter of the reorganization of the Eighth Regiment of Infantry, M. V. M. Answer. Pending.

E. P. Shaw, Treasurer of the Commonwealth, *v.* Meyer Putz Pomade Company and International Trust Company, trustee. Action of contract in the superior court for Suffolk county for corporation taxes for 1895. Tax collected. Writ discharged.

Guarantors' Liability Indemnity Company of Pennsylvania *v.* George S. Merrill, Insurance Commissioner. Bill in equity in the supreme judicial court for Suffolk county to restrain defendant from examining company and revoking license. Demurrer. Demurrer sustained. Appeal filed.

Metropolitan Construction Company *v.* Commonwealth. Action of contract in the superior court for Suffolk county. Judgment for the defendant, without costs, by agreement.

H. Burr Crandall *v.* Charles Price, superintendent. Action of tort in the superior court for Middlesex county for conversion. Pending.

Sarah J. O'Keefe *v.* Boston, Revere Beach & Lynn Railroad Company. Petition to the Middlesex county commissioners for an assessment of damages alleged to be caused by widening the location of defendant's railroad. Hearing.

Jonathan M. Swift and Laura A. Swift *v.* Commonwealth. Petition to the superior court for Plymouth county for a jury to assess damages for change of grade along petitioners' land by the construction of a state highway. Appearance entered. Pending.

Commonwealth, by the Board of Savings Bank Commissioners, *v.* The Union Loan and Trust Company. Petition to the supreme judicial court for Suffolk county for an injunction and the appointment of a receiver. Injunction granted, and Hon. Samuel W. McCall appointed temporary receiver.

E. E. Wilson, petitioner. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus*. The petitioner was in custody under a warrant from the acting governor upon the application of the governor of Missouri for his rendition as an alleged fugitive from justice. The warrant was subsequently revoked, and the petition dismissed. See p. 63, above.

Catherine Drury, petitioner, *v.* Commonwealth *et al.* Petition to the superior court for Worcester county for assessment of damages to land abutting on a state highway in Leicester alleged to be caused by changing grade of the street. Appearance entered. Pending.

Warren A. Connell and Mary Leahy, petitioners. Petition to the probate court for Middlesex county for the appointment of a guardian for Susan Connell. Appearance entered. Waived right to be heard.

New England Railroad Company *v.* Board of Railroad Commissioners. Petition to the supreme judicial court for Suffolk county for writ of *certiorari*. The case for the respondents is in charge of counsel for the town of Blackstone, the real party in interest.

Trustees of the Massachusetts Hospital for Consumptives and Tuberculous Patients *v.* Delia A. Armitage, George Armitage and Robert J. Stevenson. Bill in equity in the superior court for Worcester county for specific performance of an alleged agreement to convey land. Pending.

Andrew W. Fitzgerald *v.* Town of Southborough. Action of tort for personal injuries alleged to have resulted from a defect in a town way dug up in the course of the work of the metropolitan water board. By St. 1895, c. 488, § 12, the said board is required to save cities and towns harmless against all damages for such injuries. Superior court for Worcester county. Pending.

Andrew Chalmers *v.* Town of Southborough. Same cause of action as preceding case. Superior court for Worcester county. Pending.

Commonwealth, by the Board of Savings Bank Commissioners, *v.* The Miners' Savings Bank. Petition to the supreme judicial court for Suffolk county for an injunction and the appointment of a receiver under the provisions of St. 1894, c. 317, § 6. Injunction issued and served. Pending.

Louis Fink, petitioner. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus*. Pending.

Jacob L. Williams *v.* Commonwealth. Supplemental petition to the superior court for Suffolk county in the original petition of Moses Williams *v.* Commonwealth to assess damages for land taken by the State House Construction Commission. Judgment for respondent on agreed statement of facts. Petitioner appeals. Awaiting argument.

Attorney-General *ex rel*, Board of Harbor and Land Commissioners *v.* George H. Ellis. Information in the supreme judicial court for Middlesex county to protect the waters of a great pond under St. 1888, c. 318. Answer. Case referred to a master to find facts, etc., and report. Pending.

Fred H. Felio, petitioner. Petition to the supreme judicial court for Suffolk county for a writ of *habeas corpus*. Hearing, and prisoner discharged.

COLLECTIONS.

Collections have been made by this department as follows: —

Corporation taxes for the year 1895, overdue and referred by the treasurer of the Commonwealth to the attorney-general for collection,	$40,531 63
Interest on same at penal rate of twelve per cent.,	1,934 84
Costs,	1,437 03
Miscellaneous,	696 18
Total,	$44,599 68

The following tables show a detailed statement of the same: —

	Collected on Account of Corporation Tax for 1895.	Interest.	Total.
A L. Ober Company,	$52 32	$1 25	$53 57
A M. Gardner Hardware Company,	784 87	86 86	871 73
American Cultivator Publishing Company,	149 50	5 25	154 75
American Publishing Company,	29 90	–	29 90
American Bedstead Company,	74 75	1 81	76 56
Andover Press (Limited),	23 92	–	23 92
Arlington Hotel Company,	29 90	90	30 80
Arthur C. King Company,	104 65	5 23	109 88
Attleborough Steam and Electric Company,	428 91	8 57	437 48
Bay State Metal Works,	164 45	14 75	179 20
Berlin Falls Fibre Company,	747 50	82 73	830 23
Boston Advertising Company,	71 76	2 24	74 00
Boston Casting Company,	199 58	3 90	203 48
Boston Engraving and McIndoe Printing Company,	224 25	26 13	250 38
Boston Excursion Steamship Company,	373 75	7 47	381 22
Boston Flint Paper Company,	74 75	6 70	81 45
Boston Times Company,	50 00	–	50 00
Brookfield Brick Company,	127 07	13 98	141 05
C. W. Mutell Manufacturing Company,	112 12	6 95	119 07

	Collected on Account of Corporation Tax for 1895.	Interest.	Total.
Cape Ann Granite Railroad Company,	$299 00	$7 98	$306 98
Chandler Adjustable Chair and Desk Company,	210 04	4 90	214 94
Chas. A. Millen Company,	324 41	27 89	352 30
Chelsea Express Despatch,	74 75	–	74 75
Chequasset Lumber Company,	429 81	32 66	462 47
Coburn Stationery Company,	104 65	2 08	106 73
Composite Brake Shoe Company,	373 75	16 20	389 95
Damon Safe and Iron Works Company,	177 53	15 37	192 90
Dorchester Hygieia Ice Company,	137 54	3 42	140 96
Dunne Lyceum Bureau,	14 95	1 27	16 22
E. H. Sexton Company,	44 85	1 08	45 93
E. P. Sanderson Company,	179 40	9 53	188 93
E. W. Noyes Company,	112 12	4 48	116 60
Empire Laundry Machinery Company,	261 62	6 40	268 02
Evening Gazette Company,	448 50	8 97	457 47
F. E. Young Company,	209 30	4 18	213 48
Fiedler Silk Manufacturing Company,	33 63	87	34 50
Foxborough Foundry and Machine Company,	150 09	5 15	155 24
Framingham Nursery Company,	246 37	–	246 37
Franklin Educational Company,	134 55	11 97	146 52
George H. Wood Company,	185 38	4 88	190 26
George P. Staples & Co., Incorporated,	747 50	11 21	758 71
Globe Worsted Mills,	478 40	12 94	491 34
H. W. Downs Company,	310 96	7 56	318 52
Havenner & Davis, Incorporated,	299 00	7 98	306 98
Haverhill Roller Toboggan Company,	89 70	10 76	100 46
Haydenville Manufacturing Company,	1,121 25	43 62	1,164 87
Heliotype Printing Company,	302 73	6 70	309 43
Henry C. Hunt Company,	82 22	2 47	84 69
Horace Partridge Company,	2,990 00	331 90	3,321 90
Interstate Law Company,	22 42	65	23 07
Jewett Lumber Company,	139 03	12 28	151 31
Journal Printing Company,	29 90	–	29 90
Kimball Brothers Company,	1,495 00	47 84	1,542 84
Knowles Loom Works,	9,162 85	247 40	9,410 25
Lamprey Boiler Furnace Mouth Protector Company,	93 43	8 38	101 81
Lend A Hand Publishing Company,	104 65	8 65	113 30
Low Art Tile Company,	1,532 37	43 90	1,576 27
Lowell Iron Company,	224 25	15 96	240 21
Lyman & Kellog Company,	373 75	9 72	383 47
Lynn Foundry and Manufacturing Company,	246 67	–	246 67

	Collected on Account of Corporation Tax for 1895.	Interest.	Total.
Manufacturers' Gazette Publishing Company,	$53 82	$1 87	$55 69
Marlborough Street Railway Company,	455 75	5 32	461 07
Marston & Converse Company,	378 23	7 56	385 79
Meyers Putz Pomade Company,	149 50	15 00	164 50
N. W. Turner Company,	149 50	4 48	153 98
New England Night Lunch Wagon Company,	74 75	-	74 75
Newburyport Herald Company,	39 28	-	39 28
Norton Iron Company,	523 25	-	523 25
Old Corner Wall Paper Company,	235 46	9 54	245 00
Oriental Coffee House Company,	179 40	4 26	183 66
Original Wyman Luncheon Company,	299 00	8 97	307 97
Pearson Box and Moulding Company,	74 75	8 40	83 15
Perkins Machine Company,	52 32	1 57	53 89
Pittsfield Brass Company,	59 80	5 38	65 18
Plymouth Foundry Company,	568 10	-	568 10
Plymouth Stove Company,	373 75	11 21	384 96
Pranker Manufacturing Company,	538 20	59 18	597 38
Quaboag Steamboat Company,	45 74	5 03	50 77
S. Armstrong Company,	224 25	5 38	229 63
Salem and South Danvers Oil Company,	243 68	6 50	250 18
Scandia Granite Works,	37 37	94	38 31
Scandinavian Co-operative Mercantile Company,	82 64	7 35	89 99
Seymour-Knapp Warren Company,	46 04	1 31	47 35
Shady Hill Nursery Company,	741 52	66 18	807 70
Simpson Spring Company,	407 19	29 50	436 69
Smith-Carleton Iron Company,	897 00	80 73	977 73
Smith-Foster Shoe Company,	20 93	-	20 93
Standard Crockery and House Furnishing Company,	127 07	12 93	140 00
Standard Horse Shoe Company,	356 55	32 80	389 35
Sumner Drug and Chemical Company,	179 40	19 69	199 09
Thompson & Odell Company,	343 85	13 26	357 11
Trench Lamp Company,	7 47	-	7 47
Turner's Falls Lumber Company,	412 99	11 84	424 83
United States Tubular Bell Company,	269 10	6 64	275 74
Voorhees Electric Company,	74 75	2 07	76 82
Vulcan Foundry Co-operative Company,	29 90	-	29 90
W. C. Young Manufacturing Company,	260 13	18 20	278 33
W. F. Adams Company,	209 30	25 90	235 20
Wade & Reed Company,	1,569 75	100 46	1,670 21
Watchman Publishing Company,	452 08	9 04	461 12
Westfield Brick Company,	41 08	-	41 08

	Collected on Account of Corporation Tax for 1895.	Interest.	Total.
Whitman Electric Company,	$122 59	$3 67	$126 26
Whittemore-Woodbury Company,	89 70	3 90	93 60
Willey Company,	149 50	8 97	158 47
William H. Keeden Printing Company,	37 37	3 23	40 60
William H. King Sons Company,	74 75	6 73	81 48
William J. Dinsmore Corporation,	149 50	13 46	162 96
Woodward & Brown Piano Company,	538 20	15 60	553 80
Worcester Marble and Granite Company,	97 17	2 73	99 90
Worcester Steam Heating Company,	165 94	4 14	170 08
	$40,531 63	$1,934 84	$42,466 47

Miscellaneous Collections.

Boston Casting Company, tax, 1894, interest and costs,	$187 22
Eastman Clock Company, tax, 1894, interest and costs,	213 96
United States Automatic Service Company, account of tax, 1894,	20 00
Pearson Box and Moulding Company, tax, 1894,	75 00
Haverhill Co-operative Bank, penalty for delay in filing report under St. 1895, c. 171,	25 00
Lawrence Co-operative Bank, *ibid.*,	135 00
Amesbury and Salisbury Gas Company, penalty for failure to file return for 1895, due under St. 1886, c. 346, § 2,	10 00
Boylston Pharmacy, Incorporated, fee required upon filing certificate of condition under Pub. Sts., c. 106, § 54,	5 00
Engraver and Printer Company, *ibid.*,	5 00
Milton Light and Power Company, *ibid.*,	5 00
Vulcan Foundry Co-operative Company, *ibid.*,	5 00
Middlesex Newspaper Company, *ibid.*,	5 00
Willey Company,	5 00
Total,	$696 18

EXTRADITION AND INTERSTATE RENDITION.

The following applications for requisitions for fugitives from justice have been referred by His Excellency the Governor to this department during the year ending Jan. 20, 1897, for examination and report thereon: —

Date of Reference.	State or Country upon whose Executive Requisition was made.	Name of Fugitive.	Crime Charged.	Venue of Prosecution.	Report.
1896.					
Jan. 16,	Illinois,	Feren Fairchild,	Larceny,	Suffolk,	Lawful and in proper form.
Feb. 1,	California,	Clarence Murphy,	Larceny,	Essex,	" " "
Feb. 3,	Indiana,	George W. Ward,	Larceny,	Suffolk,	" " "
Feb. 6,	New Hampshire,	Martin Welch,	Escape,	Middlesex,	" " "
Feb. 12,	California,	Clarence Murphy,	Larceny,	Essex,	" " "
Feb. 17,	New York,	Michele Cerullo,	Assault with dangerous weapon,	Berkshire,	" " "
Feb. 18,	Pennsylvania,	Thomas Spencer,	Larceny from a building,	Middlesex,	" " "
Feb. 18,	New York,	Thomas J. Stevens,	Breaking and entering,	Middlesex,	" " "
Feb. 18,	New York,	Irving A. Adams,	Breaking and entering,	Middlesex,	" " "
March 25,	Pennsylvania,	Timothy J. Lane,	Assault with intent to commit robbery,	Essex,	" " "
May 2,	Maine,	Henry W. Colson,	Embezzlement,	Essex,	" " "
May 8,	New York,	Robert Hayes,	Attempt to commit larceny from the person,	Suffolk,	" " "
May 20,	Venezuela,	Ezekiel H. Noble,	Abortion,	Bristol,	" " "
May 27,	New Jersey,	H. C. Hudson,	Forgery,	Middlesex,	" " "

June	16,	Pennsylvania,	T. H. Howard,	Obtaining money by false pretences,	Essex,	"	"	"
June	20,	Illinois,	Martt L. Brown,	Cheating by means of false pretences,	Suffolk,	"	"	"
July	16,	Maine,	John F. Newbegin,	Assault, unlawful imprisonment and extortion,	Hampden,	"	"	"
Aug.	4,	Virginia,	Howard S. Kirbey,	Larceny from the person,	Suffolk,	"	"	"
Aug.	6,	Ohio,	John J. Lynch,	Breaking and entering,	Berkshire,	"	"	"
Aug.	19,	Pennsylvania,	Thomas Johnson,	Larceny from the person,	Suffolk,	"	"	"
Sept.	3,	Maine,	Percy Ford,	Forgery,	Plymouth,	Defective.		
Sept.	9,	Louisiana,	Edmund J. Costa, *alias* Julian E. Wilbur.	Embezzlement as clerk, servant and agent,	Suffolk,	Lawful and in proper form.		
Sept.	23,	Colorado,	Walter C. Leach,	Larceny,	Suffolk,	"	"	"
Sept.	29,	Pennsylvania,	Jacob Berkovitz,	Assault with intent to murder,	Suffolk,	"	"	"
Oct.	7,	Illinois,	Joseph J. Moskovitz,	Abandonment of infant child,	Norfolk,	"	"	"
Oct.	22,	Pennsylvania,	Hugh Osborne,	Larceny,	Essex,	"	"	"
Oct.	30,	New York,	Cornelius A. Bailey,	Breaking and entering a building and larceny,	Suffolk,	"	"	"
Nov.	10,	Rhode Island,	Charles Sowter,	Larceny,	Bristol,	"	"	"
Nov.	20,	New York,	Nicholas Durkin,	Larceny in building,	Berkshire,	"	"	"
Nov.	25,	Ohio,	Sambril Herris, *alias* Sambril Herrish, *alias* Sam Harris, *alias* Simon Harris.	Breaking and entering, larceny, polygamy,	Bristol,	"	"	"
Nov.	27,	New York,	Gioacchino Cocchiara,	Assault to commit murder,	Suffolk,	"	"	"
Dec.	3,	New York,	Richard H. Schenk,	Breaking and entering,	Franklin,	"	"	"
Dec.	9,	New York,	Edward Records,	Cheating by means of false pretences with intent to defraud.	Suffolk,	"	"	"
Dec.	9,	New York,	James J. Simpson,	Larceny in several counts,	Suffolk,	"	"	"
Dec.	22,	New York,	Henry Morton, *alias* Henry Franklin.	Burglary,	Berkshire,	"	"	"
Dec.	23,	New York,	Frank Fisher,	Larceny,	Essex,	"	"	"

Extradition and Interstate Rendition — Concluded.

The following requisitions upon His Excellency the Governor for the surrender of fugitives from the justice of other States have been referred by him to this department during the year ending Jan. 20, 1897, for examination and report thereon : —

Date of Reference.	State making the Requisition.	Name of Fugitive.	Crime Charged.	Report.
1896.				
Jan. 16,	Vermont,	Jessie Belfast,	Assisting a person to absent herself from court,	Lawful and in proper form.
April 13,	New Hampshire,	Fred H. Stewart, *alias* George Owen, *alias* James R. S. Blood.	Larceny,	" " "
April 13,	New York,	John Collins,	Grand larceny,	" " "
April 21,	Vermont,	Jack Donovan, *alias* John Donoghue,	Assault with intent to kill,	Defective.
April 22,	Minnesota,	Charles H. Holmes,	Making false report as assistant cashier,	Lawful and in proper form.
May 2,	Pennsylvania,	William J. Tousiee,	Larceny by bailee,	" " "
May 9,	New York,	Frank Lapree,	Seduction under promise of marriage,	Defective.
June 13,	New York,	Henry B. Lowrey,	Grand larceny, second degree,	Lawful and in proper form.
July 1,	New York,	Harry Phillips,	Grand larceny,	" " "
Aug. 29,	Connecticut,	James O'Meara,	Forgery,	Defective, but on reapplication, September 3, lawful and in proper form.
Sept. 8,	Pennsylvania,	Thomas Scott,	Assault with intent to kill,	Lawful and in proper form.
Sept. 19,	Pennsylvania,	Chauncey C. Markham,	Forgery,	" " "
Sept. 19,	Vermont,	Effie Yates,	Keeping house of ill-fame,	Defective.
Oct. 16,	Missouri,	E. E. Wilson,	Grand larceny,	"

Oct. 26,	New Hampshire, . .	P. G. Kimball, ...	Obtaining goods by false pretences, ...	Lawful and in proper form.
Oct. 29,	New York, . . .	M. L. Miller, ...	Forgery, second degree, ...	" " "
Nov. 10,	Maine, ...	Philip Marquand, ...	Illegal killing of moose, ...	" " "
Nov. 25,	New York, . . .	George Walters, ...	Assault, second degree, ...	As person charged was held to answer for crime committed in Massachusetts, advised the Acting Governor not to comply with request.
Dec. 17,	New York, . . .	Maggie Martin, *alias* Annie Martin, *alias* Annie M. Dupont.	Grand larceny, second degree, ...	As person charged was bound over to answer for a crime against the law of Massachusetts, advised the Acting Governor not to comply with request.
Dec. 30,	New York, . . .	Thomas Plunkett, ...	Burglary, third degree, and larceny, ...	Lawful and in proper form.
1897. Jan. 5,	Connecticut, . . .	John Lyons, ...	Theft, ...	" " "

RULES OF PRACTICE IN INTERSTATE RENDITION.

Every application to the governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person, growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant, that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the Statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence,

the application may be made by the jailor, sheriff or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.